Supreme Court, U. S.
FILED
AUG 20 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76- 76-2551

HAZELWOOD SCHOOL DISTRICT; C.O. McDONALD, Superintendent; ROBERT BISCHOF, ROBERT COLEMAN, DOROTHY SMITH, CHARLES SWEENEY, DONALD MATTOX and MILTON STRAUSS, Members of the Board of Education of the Hazelwood School District,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

WILLIAM H. ALLEN
COLEMAN S. HICKS
888 Sixteenth Street, N.W.
Washington, D.C. 20006

DON O. RUSSELL
314 No. Broadway, Suite 1210
St. Louis, Missouri 63102

Attorneys for Petitioners

Of Counsel:

Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Russell, Schechter, Weiss & Ens
314 No. Broadway, Suite 1210
St. Louis, Missouri 63102

August 1976

TABLE OF CONTENTS

		Page
OPINIONS BELOW		1
JURISDICTION		2
QUESTIONS PRESENTED		2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED		2
STATEMENT		3
REASONS FOR GRANTING THE WRIT		7
CONCLUSION		21
Appendix A –	Opinion of the District Court	1a
Appendix B –	Opinion of the Court of Appeals	1b
Appendix C –	Judgment of the Court of Appeals	1c
Appendix D –	Denial of Petition for Rehearing	1d

TABLE OF AUTHORITIES

Cases:

Brown v. Board of Education,
347 U.S. 483 (1954) 10

Chance v. Board of Examiners,
330 F. Supp. 203 (S.D.N.Y. 1971), *aff'd*, 458 F.2d 1167
(2d Cir. 1972) 15, 17

Fitzpatrick v. Bitzer,
44 U.S.L.W. 5120 (U.S. Sup. Ct. Nos. 75-251 and 75-283,
June 28, 1976) 9, 12

Page

Griggs v. Duke Power Co.,
401 U.S. 424 (1971) 18, 20

Katzenbach v. Morgan,
384 U.S. 641 (1966) 10, 11, 12, 13

Lassiter v. Northhampton County Board of Elections,
360 U.S. 45 (1959) 10

Maryland v. Wirtz,
392 U.S. 183 (1968) 8

Mayor of Philadelphia v. Educational Equality League,
415 U.S. 605 (1974) 14

National League of Cities v. Usery,
44 U.S.L.W. 4974 (U.S. Sup. Ct. Nos. 74-878 and
74-879, June 24, 1976) 8, 9, 13, 14

Oregon v. Mitchell,
400 U.S. 112 (1970) 11, 12, 13

Rodriguez v. East Texas Motor Freight,
505 F.2d 40 (5th Cir. 1974), *cert. granted*, 44 U.S.L.W.
3670 (U.S. Sup. Ct. No. 75-718, May 24, 1976) 15

South Carolina v. Katzenbach,
383 U.S. 301 (1966) 11

Stamps v. Detroit Edison Co.,
365 F. Supp. 87 (E.D. Mich. 1973), *rev'd and remanded
on another issue sub nom. EEOC v. Detroit Edison Co.*,
515 F.2d 301 (6th Cir. 1975) 15

Torrance v. Callenius,
369 U.S. 658 (1962) 14

United States v. T.I.M.E.-D.C., Inc.,
517 F.2d 299 (5th Cir. 1975), *cert. granted*, 44 U.S.L.W.
3669 (U.S. Sup. Ct. No. 75-672, May 24, 1976) 15

Washington v. Davis,
44 U.S.L.W. 4789 (U.S. Sup. Ct. No. 74-1492, June 7,
1976) 8, 9, 12, 13, 14

Constitutional and Statutory Provisions: Page

Constitution of the United States:
Fourteenth Amendment 2, 4, 7, 9, 10, 11, 12, 13, 14

Civil Rights Act of 1964, Title VII, *as amended*,
42 U.S.C. §2000e *et seq.* 2, 3, 4, 7, 8, 9, 10, 11,
12, 13, 14, 15, 16, 20

Equal Employment Opportunity Act of 1972,
86 Stat. 103 10

Fair Labor Standards Act of 1938, *as amended*,
29 U.S.C. §201 *et seq.* 8

Voting Rights Act of 1965, *as amended*,
42 U.S.C. §1973b(e) *et seq.* 10, 11, 12

Voting Rights Act Amendments of 1970,
84 Stat. 314 12

28 U.S.C. §1254(1) 2

28 U.S.C. §1345 4

Mo. Rev. Stat., Tit. XI (1969) 3

Miscellaneous:

Cohen, *Congressional Power to Interpret Due Process and
Equal Protection*, 27 Stan. L. Rev. 603 (1975) 13

Emerson, *Congress' Power to Enhance the Civil War Amend-
ments*, 49 Notre Dame Lawyer 544 (1974) 13

Estreicher, *Federal Power to Regulate Private Discrimination:
The Revival of the Enforcement Clauses of the Reconstruc-
tion Era Amendments*, 74 Colum. L. Rev. 449 (1974) 13

Orloski, *The Enforcement Clauses of the Civil War Amend-
ments: A Repository of Legislative Power*, 49 St. John's
L. Rev. 493 (1975) 13

U.S. Bureau of Census, U.S. Census of Population: 1970,
General Social and Economic Characteristics, Missouri...17, 18, 19

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-

HAZELWOOD SCHOOL DISTRICT; C.O. McDONALD, Superintendent; ROBERT BISCHOF, ROBERT COLEMAN, DOROTHY SMITH, CHARLES SWEENEY, DONALD MATTOX and MILTON STRAUSS, Members of the Board of Education of the Hazelwood School District,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners, the Hazelwood School District, its Superintendent and the members of its Board of Education, pray that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Missouri, which is reported at 392 F. Supp. 1276, appears at Appendix A, pp. 1a-26a, *infra*. The

opinion of the United States Court of Appeals for the Eighth Circuit, which is reported at 534 F.2d 805, is reprinted at Appendix B, pp. 1b-32b, *infra*.

JURISDICTION

A divided panel of the court of appeals entered a judgment on April 20, 1976, reversing a judgment of the district court in petitioners' favor, and, on May 25, 1976, the court of appeals denied a timely petition for rehearing and suggestions for rehearing en banc. (Apps. C, D, *infra*). This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Congress has authority under Section 5 of the Fourteenth Amendment to prohibit by Title VII of the Civil Rights Act of 1964 employment practices of an agency of a state government in the absence of proof that the agency purposefully discriminated against applicants on the basis of race.

2. Whether a court may disregard evidence that an employer has treated actual job applicants in a nondiscriminatory manner and rely on undifferentiated workforce statistics to find an unrebutted prima facie case of employment discrimination in violation of Title VII of the Civil Rights Act of 1964.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "SECTION 1. . . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.
>
> * * *
>
> "SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Title VII of the Civil Rights Act of 1964 provides in Section 703:

> **"(a) Employer practices.**
>
> It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2 (1970).

STATEMENT

The Hazelwood School District is an agency of the State of Missouri responsible for the organization and operation of free public schools within its boundaries. *See generally* Mo. Rev. Stat., Tit. XI (1969). Hazelwood is located at the northern tip of St. Louis County in what only several years ago was sparsely populated farming country. The Hazelwood School District was created between 1949 and 1951 from more than a dozen rural school districts, none of which provided instruction beyond the eighth grade. When the reorganized district was formed it operated eight schools, served a student enrollment of 811, and employed

27 faculty members. There were no black students and no black teachers at Hazelwood. (App. A, pp. 2a-3a).

Succeeding years brought change. School enrollment and faculty size grew dramatically; blacks joined the student body and, in small but increasing numbers, the faculty. By 1970 Hazelwood operated a system complete through high school, had a student enrollment of nearly 25,000, and employed 957 teachers. Two hundred and fifty of its students and six of its faculty members were black. The following school year Hazelwood's enrollment grew only slightly, but the number of its black students doubled to 576, and the size of its black faculty, nearly tripling, grew to 16. In 1973-74 Hazelwood increased the number of its black teachers to 22. (App. A, pp. 2a-3a).

Despite Hazelwood's efforts, required by paragraph 532.2 of its Policy Manual, to hire as teachers "the best possible certified persons within the financial ability of the district without consideration as to age, sex, race, national origin, political or religious beliefs" (R. 18)[1], the United States brought this action alleging violations of Title VII and the Fourteenth Amendment by Hazelwood in its hiring of teachers. The jurisdiction of the district court was invoked under 28 U.S.C. § 1345 and 42 U.S.C. § 2000e-6(b). The Government claimed that because 15 percent of all teachers in St. Louis County and St. Louis City together in 1970 were black, whereas only 2 percent of Hazelwood's faculty in 1973 were black, Hazelwood should be found to be discriminating illegally. (App. A, p. 18a).

1. The Opinion of the District Court

The district court rejected the Government's proposed 15 percent standard because it "is distorted by the inclusion of data from the St. Louis City district, which contains a much higher ratio of black teachers . . . ." (App. A, p. 19a). In-

[1] "R" references are to the pages of the Joint Appendix printed for use in the court of appeals.

deed, the St. Louis City school district, which employs over one-fourth of the teachers in the combined city-county area, consciously and deliberately maintains a faculty that is 50 percent black. St. Louis acknowledges that this fixed 50 percent quota is not based on the availability of black applicants for teaching vacancies or on the percentage of actual applicants for teaching positions there who are black. (R. 296).

The district court also found that for the 1971-72 school year Hazelwood had 3,127 applicants for 234 open faculty positions. In 1972-73 there were 2,373 applications for 282 teaching vacancies. (App. A, p. 4a). During this period, when Hazelwood hired only 7.5 percent of its total applicants in one year and 11.9 percent the next, the number of blacks on Hazelwood's faculty grew from six to 22, a net increase of 16. Sixteen successful applications out of a total of 71[2] show a hiring ratio for blacks of nearly 23 percent — more than twice the success rate for applicants overall.[3]

The trial court also found no evidence that Hazelwood acted discriminatorily in failing to hire the 55 unsuccessful black applicants identified by the Government at trial:

[2] Fifty-five unsuccessful black applicants were identified at trial. (App. B, p. 16b).

[3] Hazelwood's actual experience hiring black applicants may differ somewhat from this ratio of 16/71. The number of blacks hired in the 1971-72 and 1972-73 school years may well have exceeded 16, which is the figure for net increases in the black faculty. Despite the Government's careful discovery and preparation in this case, it is also possible that there were unsuccessful black applicants who were not identified at trial. On the other hand, some of the 55 black applicants who were identified at trial did not apply for employment in 1971-72 or 1972-73, the school years during which the number of black faculty members grew from 6 to 22, but rather in 1973-74, a year for which the record in this case does not include data regarding the number of new black teachers hired by Hazelwood. (App. A, pp. 7a-16a). In any event, there is no reason to think that Hazelwood's actual experience in hiring black applicants in 1971-72 and 1972-73 was materially different from the 22.5% figure established from the evidence introduced at trial.

> "With regard to those black teachers who testified that they were interviewed but not offered a position, a review of the qualifications of those teachers ultimately selected for each position shows that in every case where a comparison is possible the district's choice is readily explainable on valid, nondiscriminatory grounds." (App. A, p. 24a).

2. The Opinion of the Court of Appeals

The court of appeals ignored the statistics showing that Hazelwood hired black applicants at twice the rate of whites and articulated the controlling legal standard as follows:

> "The law is well-settled that the relevant consideration in an employment discrimination case is the statistical disparity between the proportion of blacks in the employer's workforce and the proportion of blacks in the labor market." (App. B, p. 11b) (citations omitted).

In applying this standard the court accepted the Government's claim that the relevant geographical market should be St. Louis City and St. Louis County combined. It relied on census figures showing that 15 percent of elementary and secondary school teachers in that combined area were black in 1970 (App. B, p. 10b) and held that the disparity between this and the comparable figure for Hazelwood in 1973, 2 percent, established a "*prima facie* case of a pattern or practice of employment discrimination in violation of Title VII" (App. B, p. 14b), which Hazelwood had not rebutted.

The court of appeals also found an unrebutted prima facie case of discrimination against 16 of the 55 blacks who applied unsuccessfully for teaching positions at Hazelwood,

once again in violation of Title VII. (App. B, pp. 17b-25b). The court reversed the judgment of the district court and remanded, ordering wide-ranging, specific injunctive relief. (App. B, pp. 26b-28b).[4] The court made no finding of any discriminatory purpose motivating Hazelwood's employment practices, and it did not find a violation of the Fourteenth Amendment. Chief Judge Gibson dissented. (App. B, pp. 28b-32b).

REASONS FOR GRANTING THE WRIT

This case raises two important questions. The first is whether Section 5 of the Fourteenth Amendment empowers Congress to interfere with a state's employment practices through Title VII of the Civil Rights Act of 1964 in the absence of proof of a discriminatory purpose. The second is what standards of statistical proof must be met in order to establish a prima facie case of employment discrimination under Title VII where the employment in question demands extraordinary qualifications.

1. The decision of the court of appeals was that a public school district, an agency of a sovereign state, can be held to have violated the Civil Rights Act of 1964 on the basis of a statistical showing of a disparity between the proportion of its teachers who are black and what the court thought

[4] The court of appeals ordered that the injunctive relief against Hazelwood include (1) a permanent injunction against further discrimination, (2) promulgation of job descriptions and hiring criteria, (3) inclusion in recruiting and application materials of requirements for teaching positions and procedures by which selections are made, (4) equal notice of available openings to all applicants, (5) visits to predominantly black colleges and other institutions in any recruiting, (6) assurance of student-teaching opportunities for black college students, (7) periodic reports to the Justice Department for three school years, (8) maintenance for three years of a record explaining selection of any white applicant over an available black, (9) offer to 16 previously unsuccessful black applicants of first available teaching positions for which they are qualified, and (10) back pay. (App. B, pp. 26b-28b).

was the proportion of blacks among the prospective teachers available to it. The prima facie violation of Title VII found by the court of appeals here was proved by the statistical "disparity between the proportion of blacks in Hazelwood's workforce and the proportion of blacks in the relevant labor market. . . ." (App. B, p. 14b). The legality of the decision of the court of appeals is cast in the gravest doubt by two decisions handed down in the closing days of last term, *Washington v. Davis*, 44 U.S.L.W. 4789 (U.S. Sup. Ct. No. 74-1492, June 7, 1976), and *National League of Cities v. Usery*, 44 U.S.L.W. 4974 (U.S. Sup. Ct. Nos. 74-878 and 74-879, June 24, 1976).

In *National League of Cities v. Usery* the Court, overruling *Maryland v. Wirtz*, 392 U.S. 183 (1968), held that Congress is not empowered by the Commerce Clause to impose on states acting "in their capacities as sovereign governments," 44 U.S.L.W. at 4979, rules governing the way they treat their employees. The statute whose application to state and local political entities was held unconstitutional in that case is the Fair Labor Standards Act of 1938.[5] Clearly Congress has no more power under the Commerce Clause to interfere with the exercise of a state's sovereignty by dictating whom the state may hire than by dictating minimum wages, maximum hours and overtime rules for those it does hire.[6] Thus, Title VII of the Civil Rights Act cannot be defended as an exercise of the commerce power when the act is applied to states and their local subdivisions.

There is no doubt that such a showing of statistical disparity as was made in Hazelwood's case would, if the

[5] *As amended*, 29 U.S.C. § 201 *et seq.* (1970 and Supp. II, 1972).

[6] This case illustrates just how burdensome interference with a state's hiring decisions can be. Hazelwood has been subjected to a broad injunction that includes, among other things, a three-year requirement for the generation and maintenance of special records and a three-year requirement for periodic reports to the Department of Justice. (App. B, p. 27b).

statistical analysis were valid, support a finding of a prima facie violation of Title VII by an employer other than a state body. However, in the light of *National League of Cities*, if the application of Title VII to a state body can be sustained, it can only be as an exercise of Congress' seldom-used power under Section 5 of the Fourteenth Amendment "to enforce, by appropriate legislation, the provisions" of the amendment.[7] The relevant provision of the Fourteenth Amendment that Congress undertook to enforce by application of Title VII to state bodies is the Equal Protection Clause. In the other pertinent decision of last term, *Washington v. Davis*, the Court ruled that there is a distinction between the kind of showing of discriminatory effect that, as indicated above, will satisfy the Civil Rights Act and the kind of showing necessary to make out a violation of the Equal Protection Clause itself. A "proof of discriminatory racial purpose," 44 U.S.L.W. at 4794, which ordinarily cannot be inferred from statistics showing a discriminatory effect alone, is required when the claim is a constitutional claim of denial of the equal protection of the laws.

In this case, as pointed out *infra*, pp. 14-21, the finding even of discriminatory effect is erroneous because it is based on invalid statistical analysis. But even if the statistics that the court of appeals relied upon were valid, *Washington v. Davis* makes clear that this type of evidence, which at most shows that the challenged employment practices had a "racially differential impact,"[8] 44 U.S.L.W.

[7] The authority of Section 5 was invoked when the Civil Rights Act of 1964 was amended in 1972 to make it applicable to state and local governmental units. *See* Fitzpatrick v. Bitzer, 44 U.S.L.W. 5120, 5122 n.9 (U.S. Sup. Ct. Nos. 75-251 and 75-283, June 28, 1976) and authorities cited therein.

[8] Indeed, the statistics that establish such a prima facie case may reflect only that a smaller percentage of qualified blacks than whites applied for teaching positions at Hazelwood because the demand elsewhere for black employees was so great that there were few blacks left to apply at Hazelwood. *See* discussion *infra*, pp. 18-19.

at 4792, does not, standing alone, demonstrate a violation of the Equal Protection Clause. *Id.* at 4793.[9]

Thus, the decision below poses the question whether a statute is "appropriate" legislation under Section 5 if it expands on the prohibition of the Equal Protection Clause rather than simply enforcing it. This question was addressed by the Court but not resolved, except as to the particular facts there at issue, in *Katzenbach v. Morgan*, 384 U.S. 641 (1966). There the Court upheld under Section 5 a Congressional prohibition of New York's English literacy requirements for voters educated in Spanish-speaking schools in Puerto Rico, without finding it necessary to engage in a close analysis of whether, independent of the statute, the Court would have held that these literacy requirements were forbidden by the Equal Protection Clause itself.[10] The Court did say:

> "[W]e perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement to deny the right to vote to a person with a sixth grade education in Puerto Rican schools in which the language of instruction was other than English constituted an invidious discrimination in

[9] The court of appeals based its decision here wholly on Title VII, which first applied to the Hazelwood School District on March 24, 1972. (App. B, p. 8b.n.4, *citing* the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §2, 86 Stat. 103, *amending* 42 U.S.C. § 2000e(f) (1970)). The court of appeals noted the existence of evidence regarding periods prior to that date, including the fact that schools in Missouri were segregated before the 1954 decision of this Court in Brown v. Board of Education, 347 U.S. 483 (App. B, pp. 3b-4b) but, significantly, the court in this case did not find any purposeful discrimination by Hazelwood in violation of the Equal Protection Clause.

[10] The requirements were contained in § 4(e) of the Voting Rights Act of 1965, 42 U.S.C. § 1973b(e) (1970). The Court had previously found North Carolina's literacy requirement not on its face violative of the Fourteenth Amendment in Lassiter v. Northhampton County Board of Elections, 360 U.S. 45 (1959).

> violation of the Equal Protection Clause." 384 U.S. at 656.

Moreover, the Court noted that Congress' prohibition of the denial to Puerto Ricans educated in Spanish of the right to vote was enacted "in the context of a general appraisal of literacy requirements for voting, see *South Carolina v. Katzenbach*, [383 U.S. 301 (1966)], to which [Congress] brought a specially informed legislative competence . . . ." 384 U.S. at 655-56 (footnote omitted).[11]

Katzenbach v. Morgan, then, stands necessarily only for the proposition that where an informed and proper basis exists for Congress to determine that specific state conduct is in fact "invidious discrimination in violation of the Equal Protection Clause," 384 U.S. at 656, a Congressional prohibition of that conduct may be sustained under Section 5 without this Court's having fully to satisfy itself that the conduct violates the Equal Protection Clause.

This Court's decision in *Oregon v. Mitchell*, 400 U.S. 112 (1970), indicates that the rationale of *Katzenbach v. Morgan* does not sustain the application of Title VII to Hazelwood in this case. In *Oregon v. Mitchell* the Court split sharply on the scope of Section 5 as applied to legislation lowering the voting age to 18, barring literacy tests, and prescribing requirements for presidential elections.[12] Five Justices, however, agreed that the provision of

[11] In *South Carolina v. Katzenbach* the Court had upheld the constitutionality of selected other sections of the Voting Rights Act of 1965, finding that

> "various tests and devices have been instituted with the purpose of disenfranchising Negroes, have been framed in such a way as to facilitate this aim, and have been administered in a discriminatory fashion for many years." 383 U.S. at 333-34 (footnote omitted).

[12] *Compare* Oregon v. Mitchell, 400 U.S. 135, 141-50 (1970) (Douglas, J., concurring in part and dissenting in part); and *id.* at 248-

(continued)

the Voting Rights Act Amendments lowering the voting age to 18 in state elections could not be upheld under Section 5. Although Congress had determined that this legislation was necessary to remedy denials of equal protection of the laws, the majority of the Court ruled that Congress' authority to enact remedial legislation under Section 5 had to yield to the conflicting constitutional principle that the states retain the power to regulate their own local elections.[13]

Katzenbach v. Morgan and *Oregon v. Mitchell*, then, compel the conclusion that, given the distinction drawn in *Washington v. Davis* between a sufficient statutory showing of discrimination and the required constitutional showing, when Title VII is applied to a state agency such as the Hazelwood School District it is not "appropriate" legislation under Section 5.[14] Congress has not in Title VII

[12] (continued)
50, 278-81 (Brennan, White and Marshall, J.J., concurring in part and dissenting in part) *with id.* at 126-31 (Black, J.); *id.* at 152, 204-09 (Harlan, J., concurring in part and dissenting in part); and *id.* at 286, 296 (Stewart and Blackmun, J.J., and Burger, C.J., concurring in part and dissenting in part).

The legislative provisions involved are contained in Titles II and III of the Voting Rights Act Amendments of 1970, Pub. L. 91-285, 84 Stat. 314, *amending* 42 U.S.C. § 1973 *et seq.* (1970).

[13] Oregon v. Mitchell, 400 U.S. 112, 124-31 (Black, J.) (1970); *id.* at 154-213 (Harlan, J., concurring in part and dissenting in part); *id.* at 293-96 (Stewart and Blackmun, J.J., and Burger, C.J., concurring in part and dissenting in part).

[14] Fitzpatrick v. Bitzer, 44 U.S.L.W. 5120 (U.S. Sup. Ct. Nos. 75-251 and 75-283, June 28, 1976), which sustained an award of backpay against a state agency under Title VII of the Civil Rights Act of 1964, does not suggest a different conclusion. In that case, as the Court noted, the respondents did "not contend that the substantive provisions of Title VII as applied here are not a proper exercise of congressional authority under § 5 of the Fourteenth Amendment." *Id.* at 5123 n.11. Here that contention is made. Mr. Justice Stevens questioned in that case whether extension of Title VII to the states could be upheld under § 5, because he was "not sure that the 1972 Amendments were 'needed
(continued)

narrowly singled out and prohibited a particular discriminatory state practice. Rather, it has indiscriminately sought to prohibit both instances of invidious, purposeful discrimination forbidden by the Equal Protection Clause, and conduct in which no discriminatory intent, and thus no violation of the Equal Protection Clause, is involved. Because Title VII as construed and applied here is directed at something other than purposeful state action to deny the equal protection of the laws, the statute is neither necessary nor appropriate under Section 5 for the enforcement of the Equal Protection Clause.

Moreover, as in Congress' effort to lower the voting age in state elections to 18, voided by the Court in *Oregon v. Mitchell*, extension of Title VII to the states runs flat against the conflicting constitutional principle of federalism. *Compare National League of Cities v. Usery.* Under these circumstances Section 5 of the Fourteenth Amendment provides no authority for Congress to enact the challenged legislation.[15]

[14] (continued)
to secure the guarantees of the Fourteenth Amendment,' see *Katzenbach v. Morgan*, 384 U.S. 641, 651 . . . ." *Id.* at 5124 (Stevens, J., concurring).

The important question of what limits there are to Congress' power to enact remedial legislation under Section 5 has been addressed at length in commentaries on the Fourteenth Amendment. *E.g.*, Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 Stan. L. Rev. 603 (1975); Orloski, *The Enforcement Clauses of the Civil War Amendments: A Repository of Legislative Power*, 49 St. John's L. Rev. 493 (1975); Note, Estreicher, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 Colum. L. Rev. 449 (1974); Emerson, *Congress' Power to Enhance the Civil War Amendments*, 49 Notre Dame Lawyer 544 (1974).

[15] Petitioners did not claim below that Title VII cannot constitutionally be applied to a state agency without proof that the agency intended to discriminate in its employment practices. Washington v. Davis, 44 U.S.L.W. 4789 (U.S. Sup. Ct. No. 74-1492, June 7, 1976), and
(continued)

2. If Congress had the power under Section 5 of the Fourteenth Amendment to apply Title VII to Hazelwood in the absence of proof of any discriminatory purpose, Hazelwood would at least be entitled to a judgment whether its employment practices had a discriminatory effect based on valid, relevant statistical evidence.[16] *Compare Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 620-21 (1974). This principle is nowhere more important that in a Title VII case involving a school district, because it is virtually impossible for a school district to rebut a prima facie statistical case of discrimination under that act.

Standards for hiring teachers must necessarily be flexible, and they are difficult, if not impossible, to articulate. Each decision whether to hire an applicant ultimately requires a judgment, to some degree subjective, by the school principal or other official charged with the responsibility for filling the vacancy involved. The demands of teaching positions vary from school to school, grade to grade, and subject to subject, even from classroom to classroom and year to year. There is no way to establish any

---

[15] (continued)
National League of Cities v. Usery, 44 U.S.L.W. 4974 (U.S. Sup. Ct. Nos. 74-878 and 74-879, June 24, 1976), were both decided after the court of appeals denied on May 25, 1976, the petition for rehearing and suggestions for rehearing en banc in this case. In *National League of Cities* the Court overruled one of its own precedents, a precedent that, standing unimpaired on the books while Hazelwood's case was tried and argued on appeal, would have made it futile to argue that Title VII could not constitutionally be applied to states and their political subdivisions. In *Washington v. Davis* the Court decided a question that had not been briefed and the Court acknowledged that prior decisions looked the other way, 44 U.S.L.W. at 4791-93; that opinion too was a surprise to litigants. In these circumstances petitioners here are at a minimum entitled to a remand to permit them to raise this issue before the court of appeals. *Cf., e.g.*, Torrance v. Callenius, 369 U.S. 658 (1962).

[16] The data involved are those for the school years 1972-73 and 1973-74. *See* discussion *supra*, pp. 5, 10.

single standard to assess skills in such a complex situation, and the hiring of teachers must ultimately be controlled by personal, human judgments that are in some measure subjective.

Thus, when a school district is charged with discrimination in violation of Title VII, no objective test results can ever be available to justify individual hiring decisions. If a prima facie case of discrimination is established by statistics, the school district must necessarily rely in its rebuttal efforts solely upon evidence regarding the personal, human judgments it has made in hiring its faculty. Where a court refuses to accept evidence regarding the application of those subjective standards in rebuttal of the prima facie case, the school district's cause is all but lost. Here the court of appeals did that and more: it deemed the mere existence of such subjective standards " 'to corroborate, not to rebut' " the charge of discrimination. (App. B, p. 14b). In these circumstances the need for the court's controlling statistical analysis to be based on valid, relevant data is urgent.

The defective statistical case made out by the court of appeals here illustrates the general problem that courts have in dealing with statistics in Title VII cases. For example, the nature of the statistical data and the treatment of them in *Chance v. Board of Examiners*, 330 F. Supp. 203 (S.D.N.Y. 1971), *aff'd*, 458 F.2d 1167 (2d Cir. 1972), and *Stamps v. Detroit Edison Co.*, 365 F. Supp. 87 (E.D. Mich. 1973), *rev'd and remanded on another issue sub nom. EEOC v. Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975), contrast sharply with the nature of the data and their treatment by courts of appeal in two cases awaiting argument this term, *Rodriguez v. East Texas Motor Freight*, 505 F.2d 40 (5th Cir. 1974), *cert. granted*, 44 U.S.L.W. 3670 (U.S. Sup. Ct. No. 75-718, May 24, 1976), and *United States v. T.I.M.E.-D.C., Inc.*, 517 F.2d 299 (5th Cir. 1975), *cert. granted*, 44 U.S.L.W. 3669 (U.S. Sup. Ct. No. 75-672, May 24, 1976).

We believe that consideration of the present case, in which the judgment of the court of appeals rests upon a statistical analysis that is plainly defective in at least three respects, would give the Court a useful additional perspective that would illuminate the issues regarding the use of statistics that it will in any event be considering in the cited cases.

(a) Ignoring statistical data showing that Hazelwood hired nearly 23 percent of the blacks who applied for teaching positions in the relevant period, a rate more than double the figure for applicants overall, the court of appeals in this case relied on

> "the statistical disparity between the proportion of blacks in the employer's workforce and the proportion of blacks in the labor market" (App. B, p. 11b)

and determined that the Government had made out a prima facie case of illegal discrimination by Hazelwood against black applicants.

However relevant workforce statistics may be in a Title VII case involving alleged racial discrimination where there is no record of actual black applicants and the rate at which they are hired, if direct evidence of the treatment of applicants is available, these data, and not general workforce statistics, are necessarily controlling. This is so because the most direct evidence about discrimination in hiring relates to actual unsuccessful applicants. Workforce statistics are but a surrogate for applicant-flow data; they are necessarily less reliable than evidence regarding actual applicants because in order to be relevant they require the inference that the proportion of blacks in the pool of applicants for the jobs at issue has been the same as the share of the overall labor market held by blacks. If the applicant-flow data clearly show an absence of discrimination against

blacks at the same time that workforce statistics seem to lead to a different conclusion, the applicant-flow evidence must control, at least if, as here, the record shows both that blacks have actually applied for jobs and that a substantial number have been successful—where, in short, there is no indication that applications from blacks have been discouraged. On the record in this case the finding of discrimination by the court of appeals on the basis of workforce statistics is clearly erroneous. *Compare Chance v. Board of Examiners, supra,* 330 F. Supp. at 209.

(b) Moreover, if workforce statistics were somehow relevant here, the undifferentiated data relied on by the court of appeals are demonstrably incorrect. Both the 15 percent figure that the court accepted as the black share of the overall St. Louis labor market and the 2 percent figure taken for Hazelwood are invalid.

The court of appeals correctly noted that

> "caution is necessary when using statistical evidence to analyze . . . disparities in employment figures for professional and academic positions. The raw data often will obscure the actual number of persons in the general workforce, white and black, who possess the special qualifications needed for particular openings." (App. B, p. 8b n. 5).

Census figures corroborate this judgment, for they show that whereas blacks constituted 19 percent of the total population of St. Louis City and St. Louis County together in 1970,[17] blacks made up only 6.4 percent of the population there with at least four years of college

[17] 299,847 of 1,573,587 inhabitants there were black. (U.S. Bureau of Census, U.S. Census of Population: 1970, General Social and Economic Characteristics, Missouri ("1970 Missouri Census"), Tables 81 (p. 27-283), 91 (p. 27-323), 119 (p. 27-431), 125 (p. 27-486)). (*See* R. 872, 875, 878; App. A, p. 18a.).

education,[18] a minimal qualification required of all applicants for teaching positions in public schools.[19]

This 6 percent figure is a direct, if necessarily imprecise, measure of the black proportion of the labor market in the St. Louis area that is educationally qualified to teach. The 15 percent figure adopted by the court of appeals, on the other hand, states only the proportion of teachers in the area who are black and simply ignores the question at issue: what share of persons in the St. Louis area who are educationally qualified to teach, and who might reasonably have applied for teaching positions at Hazelwood, are black?

Interestingly enough, the data underlying the 15 percent figure show that one-half of the blacks in St. Louis City and St. Louis County combined who have four years of college education are employed as teachers.[20] The comparable

[18] Out of a total of 92,733 persons in the combined city-county area who had completed four years of college in 1970, 5,946 were black. (1970 Missouri Census, Tables 83 (p. 27-291), 91 (p. 27-323), 120 (p. 27-441), 125 (p. 27-486)). (*See* R. 875, 879, 883.).

[19] There is no dispute here that the requirement of a college degree is properly and necessarily related to the performance of teaching duties. *Compare* Griggs v. Duke Power Co., 401 U.S. 424 (1971), where a requirement that applicants have a high school diploma or pass a general intelligence test was determined not to be related to the performance of the jobs at a steam generating plant for which the requirement applied.

[20] In 1970 there were 2,997 black teachers in St. Louis City and St. Louis County out of a total of 5,946 blacks there who had at least four years of college education. (1970 Missouri Census, Tables 91 (p. 27-323), 93 (p. 27-331), 125 (p. 27-486), 127 (p. 27-494)). (*See* R. 875-76, 883-84; App. A, pp. 18a-19a.).

figure for non-blacks is only about one-fifth,[21] and, if anything, these data suggest a reason why only 71 blacks applied for teaching positions at Hazelwood during the 1972-73 and 1973-74 school years: so many of the limited number of blacks with four years of college education had already been hired into the teaching profession elsewhere that there were simply very few qualified blacks available to apply for positions at Hazelwood.

In addition, the black share of total teachers in the St. Louis labor market is seriously distorted by inclusion of figures for St. Louis City, which in 1970 employed nearly three-fourths of the black teachers in the area including St. Louis County, although city teachers constituted only about one-quarter of the total number of teachers in the combined area.[22] The city figures result from application of a fixed 50 percent quota that is not determined by reference to the availability of black applicants in the St. Louis labor market. Indeed, since in 1970 the city had to absorb fully half of all blacks in the combined city-county area who had completed four years of college in order to hire its 2,182 black teachers,[23] the only reasonable inference is that the

[21] In 1970 there were 16,428 non-black teachers in St. Louis City and St. Louis County out of a total there of 86,787 non-blacks who had at least four years of college education. (1970 Missouri Census, Tables 83 (p. 27-291), 86 (p. 27-303), 91 (p. 27-323), 93 (p. 27-333), 120 (p. 27-441), 122 (p. 27-461), 125 (p. 27-486), 127 (p. 27-494)). (*See* R. 873, 875-76, 879, 881, 883; App. A, pp. 18a-19a.).

[22] There were 19,425 teachers employed in the combined area in 1970 and 2,997 of these were black. (1970 Missouri Census, Tables 86 (p. 27-303), 93 (p. 27-333), 122 (p. 27-461), 127 (p. 27-494)). (*See* R. 873, 877, 881; App. A, pp. 18a-19a.). 5,238 teachers were employed in St. Louis City, including 2,182 blacks, approximately 40% of the total (1970 Missouri Census, Tables 86 (p. 27-303), 93 (p. 27-333)). (*See* R. 873, 877; App. A, p. 18a.). By 1973 the city had increased the black proportion of its teachers to 50%. (R. 296).

[23] In 1970 the share of the city's teachers who were black was 40%, not the full 50% quota that the city reached by 1973. (App. A, p. 18a).

efforts of St. Louis City to achieve its 50 percent quota for black teachers require the city to make a disproportionately heavy draw on the available pool of qualified blacks, thereby decreasing the availability of black applicants for outlying districts like Hazelwood.

In any event, since the city's 50 percent quota does not reflect the availability of blacks among potential qualified applicants in the combined city-county area, it provides no evidence whatever about the racial balance of the pool of qualified persons available to apply for teaching positions at Hazelwood. Yet it is a very substantial component of the 15 percent overall figure on which the court below relied. Because the quota has such a significant effect on the overall racial balance of teaching faculties in the combined area, this 15 percent statistic is irrelevant and misleading.

(c) The 2 percent figure taken by the court of appeals as the relevant black share of Hazelwood's teaching faculty is also mistaken, because it is derived from a comparison of the number of black teachers in the Hazelwood system in the 1973-74 school year, 22, with the total of 1,231 teachers there that year. (App. B, p. 4b). This ratio might be relevant if the issue here involved Hazelwood's employment practices over the past several decades.[24] As applied to the Hazelwood School District, Title VII deals, however, only with the more recent period beginning in March of 1972.[25]

[24] The 2% figure is necessarily an estimate because, although it reflects the race of all teachers hired, the totals are net of reductions by retirement, resignation, death or other cause.

[25] Evidence regarding practices prior to the application of Title VII can be relevant in certain circumstances. As the Court pointed out in Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971), this may be so when present practices preserve the effects of prior discrimination. This situation can arise, for example, in cases involving promotion, transfer, or seniority rights for employees. The present case, however, involves only hiring, and accordingly there is no issue here regarding preservation of the effects of past discrimination. The suggestion by the court of appeals that pre-1972 experience is relevant in this case (App. B, pp. 3b, 9b) is without support in either logic or precedent.

During that period Hazelwood's teaching staff grew from 957 to 1,231 (App. A, p. 3a), and the number of its black teachers increased from six to 22. Thus, the net increase in black teachers, 16, during this period was 6 percent of the overall increase of 274. As pointed out, *supra*, pp. 17-18, 6 percent is also the share that is black of the population in St. Louis City and St. Louis County combined who have four years of college education. Moreover, blacks make up 6 percent of the total number of teachers in St. Louis County (App. A, p. 19a), *i.e.*, that part of the area whose workforce the court below looked to where figures are not distorted by St. Louis City's 50-50 racial quota.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM H. ALLEN
COLEMAN S. HICKS
888 Sixteenth Street, N.W.
Washington, D.C. 20006

DON O. RUSSELL
314 No. Broadway, Suite 1210
St. Louis, Missouri 63102

Attorneys for Petitioners

Of Counsel:

Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Russell, Schechter, Weiss & Ens
314 No. Broadway, Suite 1210
St. Louis, Missouri 63102

August 1976

APPENDIX A

UNITED STATES of America,
Plaintiff,

v.

HAZELWOOD SCHOOL DISTRICT et al.,
Defendants.

No. 73C 553 (A).

United States District Court,
E.D. Missouri, E.D.
April 11, 1975.

MEMORANDUM OPINION

HARPER, District Judge.

This "pattern and practice" suit was brought by the Attorney General on behalf of the United States, seeking relief from alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and the Fourteenth Amendment. The Court has jurisdiction pursuant to 28 U.S.C. § 1345 and 42 U.S.C. § 2000e-6(b).

Defendants, Hazelwood School District, its superintendent and members of the Hazelwood Board of Education, are charged with maintaining a number of employment practices which have the effect of discriminating against black applicants for employment in faculty and staff positions with the Hazelwood District. The various individual claims of the plaintiff may be summarized as follows: (1) The district has not taken affirmative steps to overcome the discriminatory effects of previously operating a purportedly dual school system; (2) evidence of employment statistics establishes a prima facie case of racial discrimination; (3) defendants utilize recruiting and in-

terview techniques which are discriminatory per se; and (4) during recent school years defendants failed to hire numerous black applicants who were better qualified for vacant teaching positions than were the white applicants ultimately chosen to fill those positions. Plaintiff requests that the Court order imposition of numerical hiring quotas, institution of an affirmative recruitment program aimed at attracting black applicants, development of non-discriminatory employment criteria, and individual offers of employment with back pay to black applicants who were refused employment.

A rudimentary description of the location and history of Hazelwood School District is contained in a pre-trial stipulation filed by the parties. The district covers 78 square miles in northernmost St. Louis County. It was formed from thirteen rural school districts between 1949 and 1951 by process of annexation. At that time the district maintained eight schools with an enrollment of 811 and a faculty of 27. For the school year 1954-1955 the same eight schools remained in existence and the ninth grade of a future four-year high school was initiated.

The first realization that black students might be present in the district apparently came in 1954. The minutes of the Hazelwood Board of Education show that the superintendent informed the Board on November 20, 1954, that blacks had rented property in the district, but that he no knowledge as to whether they had children of school age. The Board instructed the superintendent to admit any children of black residents, but "in view of their being so decidedly in the minority * * * to offer payment of tuition to negro pupils to a school of more predominantly negro enrollments." (Plf's Ex. 57).

Plaintiff's Exhibit 55 discloses that by the 1967-68 school year the total enrollment in the Hazelwood District was 17,550, of which 59, or approximately one-third of one percent, were black. For the year 1970-71 there were a total of

24,256 students in the Hazelwood system. Black students during that year numbered 250, or one percent of the total enrollment. During 1972-73 defendant had a black enrollment of 576, which was approximately two percent of the total 25,166 students in attendance.

Hazelwood did not hire its first black teacher until the 1969-70 school year (Hord Dep. 45-46). During the 1970-71 school year the district employed six black teachers out of a staff of 957. In the fall of 1972 defendants' teaching staff numbered 1,107, out of which 13 were black (Plf's Ex. 55). The black teaching staff was increased to 16 by the end of that school year. For the year 1973-74 defendant maintained a full-time professional faculty of 1231, of which 22 were black (Plf's Ex. 55).

J.W. Hord, personnel director for the Hazelwood schools since 1962, stated that he is the only person involved in the recruiting of teachers (Hord Dep. 9). When he first came to the Hazelwood district most of its teachers came from Southeast Missouri State Teachers College (Hord Dep. 11). He stated that at that time there was a "tremendous shortage" of teachers and that the heavy recruiting at Southeast Missouri State occurred because the Hazelwood staff had many contacts at that college. Hord was instructed to try to attract teachers from other colleges and universities in order to obtain a broader distribution of schools. Thereafter, the district recruited at numerous colleges, selected primarily for their availability of candidates and proximity to St. Louis (Hord Dep. 9). The list of schools includes many of those in Missouri as well as a few from Illinois, Arkansas, Kansas and Oklahoma (Defendants' Answer to Plaintiff's Request for Admission No. 46). All of the colleges listed have predominantly white student bodies. During the period in question Missouri had two four-year colleges, Lincoln University and Harris Teachers College, which offered teaching degrees and which had a substantial number of black students (Plf's Ex. 51). Hazelwood district

did not do any recruiting at Harris Teachers College. Hord made one visit to Lincoln University in 1963 or 1964, where he inquired as to prospective teacher candidates. He stated that the reaction from the placement director was "not very favorable" because of the teacher shortage which existed at the time (Hord Dep. 8). At the trial Hord testified that while it was necessary to "search constantly" to find teachers in the early 1960's, today the district has 2300 applications on file and has reduced its recruiting efforts (Tr. 38). For the 1971-72 school year Hazelwood had 3,127 applicants competing for 234 teaching vacancies (Tr. 358); the following year there were 2,373 applications filed and only 282 openings.

Employment applications are sent to everyone requesting them (Hord Dep. 12). Candidates are requested to furnish information concerning their activities, experience with youth organizations, education, prior teaching experience, extent of reading and travel, and additional related training. Formerly the application forms contained spaces for nationality, religion and a picture of the applicant. This practice was officially discontinued in 1954 (Kirby Dep. 56-57), although some application forms still contained space for designating the applicant's race until the 1962-63 school year (Defendants' Answer to Plaintiff's Interrogatory No. 12, March 1, 1974). Each fall the district asks all applicants to update their files; any that are not so updated are destroyed (Tr. 35).

When the personnel office is notified of vacancies within the district, they contact applicants to arrange for interviews (Hord Dep. 13). At one time every applicant was notified of each vacant position, but with the large number of applications on file today the district first notifies those applicants who have recently come to the attention of the personnel office or who have otherwise informed the district of their continuing availability (Hord Dep. 14-15). The personnel office checks to see that each applicant has a

Missouri certification to teach. In certain fields, such as home economics, certification is required in a particular area of specialization within the applicant's field (Hord Dep. 16, 32-33; Huss Dep. 24). The only other minimum requirement for faculty positions is a health certificate (Defendants' Answer to Plaintiff's Interrogatory No. 6).

The practice at Hazelwood is to invite several applicants at a time to a group meeting with the elementary or secondary coordinator who describes the district to them. The applicants are then sent to one or more schools where vacancies exist. Actual interviews are conducted by the respective school principal or by a department chairman or program coordinator. The only instruction given to persons in charge of hiring is to obtain the "most competent" person available for the position (McDonald Dep. 18). There are no other specific standards for employment (McDonald Dep. 51). In addition to the information supplied on the candidate's application form, the interviewer relies on a number of intangibles such as personality, disposition, appearance, poise, voice, articulation, and ability to deal with people (Hord Dep. 25; Huss Dep. 24). Forms used by the interviewer contain spaces for evaluation of an applicant's personal attributes, including knowledge of teaching responsibilities, knowledge of subject area, personal appearance, voice, confidence, personality, attitude toward profession, etc. The applicant is rated as above average (or superior), average, or below average as to each of these traits. In addition, there is space provided for the interviewer's comments.

The most comprehensive explanation of how a teacher is selected appears in the deposition of Frank Fox, principal of Hazelwood Junior High School. He stated that he discusses vacancies with his assistants and department chairman in order to determine what sort of individual is required with respect to personality, philosophy of education, and how particular teaching situations need to

be handled (Fox Dep. 7). They then examine individual applicants in order to discover their background experience and type of activities in which they participated in school. Of particular interest are types of employment, both teaching and non-teaching, and contacts with youth groups such as Boy Scouts and Girl Scouts (Fox Dep. 7). Fox does not prefer a master's degree over a bachelor's degree and does not necessarily select the person with the most experience, placing more emphasis on the quality of the experience (Fox Dep. 8). Most other Hazelwood administrators likewise discounted the achievement of a master's degree. Persons with student or substitute teaching experience at Hazelwood are given preference if their performance was satisfactory. (Huss Dep. 29).

At the trial plaintiff called as a witness Rufus Young, director of personnel for the St. Louis City Board of Education. Young testified that the St. Louis school system employs a full time recruiter (Tr. 331), but that recruiting is generally limited to those teaching areas in which there is a shortage, such as industrial arts, science and math, special education and foreign languages (Tr. 335). The St. Louis City district tries to obtain the "best possible" teacher, but at the same time maintains a ratio of black teachers of about fifty-one percent (Tr. 332-333). He testified that the district had discussed basing this ratio alternatively on the racial balance of the city's population, the racial balance of the students in attendance in the district or on the present racial makeup of the faculty, but that no specific basis has been chosen. When applications are received by the St. Louis district they are reviewed by both a black and a white supervisor who rank them according to national teacher examination scores and other information available, such as years of teaching experience and highest degree attained (Tr. 347, 349). When the superintendent requisitions for a new teacher the personnel office furnishes several names from those applicants with higher rankings. The superintendent may indicate a preference for a black or white

teacher in order to "enhance staff balance" (Tr. 348). Interviewing is conducted by the individual school principals or others chosen by the superintendent. During the interview notice is taken of whether the person being interviewed has certain intangible assets which might cause him to be preferred over another applicant (Tr. 349). Young testified that other than certification, teaching experience, degree held, position applied for, and the other factors mentioned previously, the only objective, non-discriminatory procedure which could be used in selecting teachers would be testing, which is generally forbidden (Tr. 351).

Twenty-five black teachers testified at the trial that they applied unsuccessfully for positions at Hazelwood. In addition, plaintiff produced Hazelwood personnel records containing the applications of thirty-two other teachers who are claimed to be black and who applied for teaching or administrative positions at Hazelwood for 1972-73 and 1973-74, the years for which the district had retained personnel records prior to the trial. Twelve of these thirty-two applicants were subpoenaed and claimed their attendance in court, but were not called to testify at the trial.

Judith Ealy testified that she applied to Hazelwood on August 3, 1973 (Tr. 46). Although there was a vacancy in her field, business education, she did not have a vocational teaching certificate. The personnel director reviewed her transcript but told her that she lacked enough credit hours to obtain her vocational certification (Tr. 49). Miss Ealy had been employed by the St. Louis City school district for 1972-73, and she was re-employed in August of 1973 for the 1973-74 school year (Tr. 52, 54). She applied for a vocational certificate about a month prior to trial, but her application had not been acted upon as of the date of trial (Tr. 56).

Nikki Lenoir applied for a position as English teacher mid-August of 1973 but was not given an interview. She

testified that she was not surprised to learn that there were no openings at that time, since school was to start on about September 1st (Tr. 61). She has been working at either the St. Louis City or Kirkwood districts since September of 1973 (Tr. 62).

Pearlie Boyd graduated in business education in June of 1971. While working for another district she applied for a teaching position at Hazelwood in January or February of 1972 (Tr. 63), but was told that there were no openings at that time of year (Tr. 67). She has a general elementary and secondary Missouri certificate, but does not have a business education certificate (Tr. 64). In June of 1972, she began working as a business instructor for Manpower Business Training and was employed by the Frisco Railroad at the date of trial (Tr. 65).

Alice Moore Roach testified that she applied to Hazelwood on April 30, 1972 (Tr. 75), but had not yet applied for teaching certification at that time (Tr. 78). Mrs. Roach was subsequently employed by the St. Louis City district for the 1972-73 school year and was completing her second year there at the time of trial (Tr. 75).

Atry Cotton testified that he applied to teach special education at Hazelwood in July of 1970 but was not interviewed for a position (Tr. 80, 81). He stated that he didn't know at that time that St. Louis County had a centralized special education district rather than separate ones in each school district, although it was stipulated by plaintiff's counsel that this is the case (Tr. 84). Cotton is now teaching special education in the St. Louis City school district.

Alberta Riggs applied as a librarian or English or Biology teacher with the Hazelwood district on May 17, 1973 (Plaintiff's Ex. 34). Mrs. Riggs initially contacted Francis Huss, coordinator of secondary education, seeking interviews for herself and another black applicant, Mrs.

Gerst, who had experience as a reading teacher. Huss informed Mrs. Riggs that he had no vacancy in her field, English, but invited her to come in with Mrs. Gerst to interview for reading teacher (Huss Dep. 41). At the interview Huss was "very much impressed" with Mrs. Gerst, who was subsequently hired at Kirby Junior High School, but noted on Mrs. Riggs' interview form that she was "over critical and opinionated to the extent that she approached rudeness" (Plf's Ex. 34). Huss stated in his deposition that Mrs. Riggs expressed her disapproval of the school curriculum, the class schedule and the policy of requiring teachers to remain on the campus during lunch breaks (Huss Dep. 42-43). In addition, after reviewing her course work Huss determined that Mrs. Riggs was not qualified to teach reading, where the vacancy existed (Huss Dep. 42, 44). One month after she applied to Hazelwood Mrs. Riggs began teaching and taking course work at Southern Illinois University (Tr. 108).

Robert Howell testified that he applied for a position teaching social studies in May of 1971, but he enrolled at Webster College for the fall semester of that year (Tr. 109, 112). He served as a student teacher at Hazelwood for a semester while attending Webster College (Plf's Ex. 21) and reapplied for a permanent position at Hazelwood in March of 1973. Howell stated that he was aware that social studies is one of the most competitive of all teaching fields, and he applied to four other districts in addition to Hazelwood (Tr. 114, 115). He accepted a position with the St. Louis district where he was employed at the time of the trial (Tr. 115).

Melvin Lowe applied for a position teaching physical education on April 26, 1972, but did not receive Missouri certification to teach until October or November of 1972 (Tr. 117, 118). He has been employed by the St. Louis City School district since applying to Hazelwood (Tr. 117).

James Washington applied to Hazelwood on March 6, 1973 (Tr. 121). He testified that his college major was in

social studies and that he had a minor in physical education (Tr. 122). He was working as a substitute teacher at two other school districts at the time he applied to Hazelwood (Tr. 122) and continued in that capacity until February of 1974 (Tr. 123). Washington applied to seven or eight other school districts in addition to Hazelwood and stated that he knew there was an overabundance of applicants in the area of social studies (Tr. 124). In February of 1974 he located a permanent position teaching for the University City school district (Tr. 125).

Westelle Florez applied to the Hazelwood district in May or June of 1973 (Tr. 126). In August of 1973 Hazelwood officials telephoned her to see if she was available, but she had already signed a teaching contract with the Ferguson-Florissant district (Tr. 129).

Cullen Cook obtained a master's degree from Central State University in Oklahoma in June, 1972, and taught Junior College in Oklahoma until January, 1973 (Tr. 134). He did not apply to Hazelwood until August 16, 1973. He admitted that almost all teaching positions are filled by then, but stated that he made applications to as many St. Louis area districts as he could find hoping to get a position (Tr. 135). Cook testified in addition that his area, art, was a popular field (Tr. 136). Since September of 1973 he has worked as a substitute teacher at Kirkwood (Tr. 133).

Patricia Fletcher applied for a physical education position with Hazelwood in May of 1973 and was interviewed by the principal of Brown elementary school on June 19, 1973. Mrs. Fletcher testified that her undergraduate grade point average was 3.42 on a 4.0 scale (Tr. 150-151). The Brown position was offered to a white applicant on July 7, 1973. This applicant's grades were comparable to those of Mrs. Fletcher; she was awarded a scholarship in college, and was selected for publication in Who's Who in American Colleges and Universities. She was a graduate of Hazelwood High School and had been offered a position at Hazelwood for the 1970 school year, but turned it down to teach in another district (Plf's Ex. 2, Vol. V, pp. 583-599).

Cynthia Edmond applied for a position as social studies teacher on July 10, 1972, but was told that there were no vacancies in her field (Tr. 156). She renewed her application the following year but was not interviewed. No evidence was introduced concerning her current employment status.

Derek Novel likewise applied for a social studies teaching position. He filed applications on January 31, 1973, and again in March, but on both occasions received letters stating that there were no vacancies in that field (Tr. 159). Novel stated that social studies is "one of the more competitive fields in teaching today" (Tr. 166). The record does not disclose whether he is currently teaching school.

Naomi Cooksey filed an application on June 28, 1973, seeking a teaching position in "music education/Afro-American music" (Plff's Ex. 64), but was not offered an interview. She has been employed by the St. Louis City district since the fall of 1973 (Tr. 162). Plaintiff introduced evidence that Hazelwood hired two new music teachers for the 1973-74 school year (Plff's Ex. 2, Vol. IV p. 40; Vol. VIII p. 336; Defts' Ans. to Int. No. 1(a) of Feb. 4, 1974, and Int. No. 2 of August 17, 1973). One of these, Kenneth Heim, applied on May 20, 1973, and was interviewed by the department chairman on May 23rd, more than a month prior to Cooksey's application. The interviewer gave Heim excellent ratings in every category (Plf's Ex. 2, Vol. IV, p. 45). The other new music teacher, Faye Herman, applied on May 4, 1973, and was interviewed June 1st. She, too, was rated as excellent by her interviewer (Plf's Ex. 2, Vol. VIII, p. 342). The qualifications of both of these applicants based on the application forms were comparable to those of Mrs. Cooksey, and they had been interviewed and were already under consideration before Mrs. Cooksey filed her application.

Beverly Ellis applied for an elementary teaching position on August 4, 1972. She was interviewed by the principal of Brown Elementary School who rated her personal characteristics as "average" but did not recommend her for employment because her application form showed that she had held five different teaching positions during seven years of employment (Plf's Ex. 12). Miss Ellis was subsequently referred to the principal of Charbonier School, who interviewed her for a third grade position. The applicant who was ultimately offered the latter position had just finished working as a substitute teacher at Charbonier during the previous year (Plf's Ex. 2, Vol. V, pp. 39-40). Miss Ellis was working for the St. Louis City district at the time of her application to Hazelwood, and was still working there at the time of the trial (Tr. 171).

Samuel Downs applied for a position on May 24, 1972, as industrial arts teacher. The personnel director talked with Downs but told him that there would only be an opening if a teacher then on sabbatical leave failed to return (Tr. 177). He was not subsequently contacted by Hazelwood and is now teaching in the University City school district (Tr. 178).

Delores Penton filed an application for a kindergarten or elementary level position on June 21, 1973, but was not interviewed. She did not graduate from college until July and, therefore, did not have her teaching certificate at the time of her application when teachers for the 1973-74 school year were being selected (Tr. 180).

Lonnie Lockett applied for a position as industrial arts teacher at the secondary school level on April 5, 1973 (Plf's Ex. 25). He was interviewed by the department chairman, who stated on the interview form that Lockett was not qualified to teach industrial arts because he had no experience teaching electricity or power mechanics. The interviewer also commented that Lockett was nervous and "somewhat difficult to understand." Plaintiff introduced evidence showing that five industrial arts teachers were

hired by Hazelwood for the 1973-74 school year subsequent to Lockett's application. A review of their records discloses that three of these teachers did have the desired background in electronics (Plf's Ex. 2, Vol. VII, p. 395; Vol. IX, pp. 317-19; and Vol. I, p. 155), and that a fourth, although he had no electronics experience, was highly recommended based upon his performance as a student teacher at Hazelwood West Junior High School (Plf's Ex. 2, Vol. VI, p. 444). Mr. Lockett is currently employed in the engineering department of Airtherm Manufacturing Company in St. Louis (Tr. 183).

Sandra Reid filed an application with the Hazelwood district on March 7, 1973. In June she was informed that Brown Elementary School was looking for someone with a background in her field, science (Tr. 187), and she was interviewed for the job. The principal of Brown recommended her for a teaching position but chose someone else to fill the Brown slot (Plf's Ex. 33). The teacher chosen for the Brown position had served as a student teacher and substitute teacher at Hazelwood (Plf's Ex. 2, Vol. VIII, pp. 399-400). On August 16, 1973, the principal of Brown called Mrs. Reid to offer her a second or fifth grade position, but she had already signed a contract with the Berkeley School District (Tr. 188, 192).

Jerome Trotter testified that he applied for an elementary or secondary physical education teaching position in Hazelwood during the summer of 1970 (Tr. 195). He was interviewed by a physical education department administrator and by the principal of Elm elementary school, but was not offered a position (Tr. 197-198). Plaintiff introduced into evidence the records of a number of physical education teachers hired by Hazelwood between January, 1971, and the fall of 1973, but not for 1970. The deposition of Hazelwood's personnel director, J.W. Hord, introduced into evidence by plaintiff (Tr. 15), discloses that the reason Trotter was not hired was because of a very adverse recom-

mendation from his previous employer (Hord Dep. 41). Trotter obtained a position with the St. Louis district that year and is now with the Normandy school district (Tr. 196).

Geneice Kincaid filed an application for physical education teacher in July of 1971 (Tr. 201). She received an interview with someone at the administration building who told her he thought there was a vacancy at one of the elementary schools. However, the official called the school principal and was told that the principal already had someone in mind for the position (Tr. 202). Miss Kincaid filed a second application on June 7, 1972, but was informed by mail on June 9th that there were no vacancies that year (Plf's Ex. 24). At the time she testified Miss Kincaid was employed with the St. Louis City Board of Education (Tr. 205).

Vina Jones filed an application on April 9, 1973, seeking a position as business teacher with the Hazelwood district (Plf's Ex. 23). She testified that she also applied in April of 1972 just before graduating from college (Tr. 207). Her application does not reflect whether she held a vocational certificate. Only two business teachers were hired for the 1973-74 school year. One had four years prior teaching experience and the other had secretarial business experience and had been rated as an outstanding student teacher with the Hazelwood district (Plf's Ex. 2, Vol. VII, pp. 203, 204; Vol. X, pp. 432, 435-436). Vina Jones is currently teaching in the St. Louis city school district (Tr. 208).

Willie Palmer applied to the Hazelwood district on May 3, 1972, for a position as reading specialist, administrator or science teacher (Plf's Ex. 31). He was not certified as a science teacher (Tr. 213) and did not have a Master's degree as required for an administrative position in Missouri (Tr. 214). He has been teaching reading at University City High School since 1970 (Tr. 213, 215). Mr. Palmer's last pay level listed on his application, $11,200.00 (Plf's Ex. 31), was apparently about $2,000.00 per year greater than the Hazelwood district could offer for the position he sought.

Charlene Catlin applied for a home economics position at Hazelwood on July 8, 1972 (Plf's Ex. 63). She was interviewed for vacancies at three schools, including Hazelwood West Junior High School, but was not offered a position (Tr. 219-220). Mrs. Catlin was highly rated by her interviewer, but notations on her application and interview forms indicate that she was not qualified because although she held a general home economics certificate, she did not have the vocational certificate which is required of all home economics teachers in the Hazelwood district (Plf's Ex. 63, Hord Dep. 32-33, Huss Dep. 24). She had been teaching in the St. Louis City district since the fall of 1972 (Tr. 218).

Turning to the Hazelwood personnel records containing the applications of thirty-two other teachers (who did not testify) for positions at Hazelwood for 1972-73 and 1973-74 which were offered by the plaintiff, the record discloses that two of the applicants, Barbara Houston (Kirby) and Carol Jackson, were among the teachers hired by Hazelwood in those years (Plf's Exs. 22 and 72; 66). Only two of the other applicants were actually interviewed for a position.

The records offered in evidence disclose that Gerald Trotter (who was subpoenaed, claimed his witness fees for being present in court, but did not testify) applied for a physical education, health or psychology position for grades 4 to 6 on March 30, 1972 (Plf's Ex. 44). He was interviewed for a position on May 19th and on June 15th was notified that the position had been filled. Trotter's application form shows three years' teaching experience at three different grade schools. His personal form does not contain any interview form. Plaintiff introduced evidence concerning eleven persons hired by the Hazelwood district as physical education instructors for 1972 and 1973. One of these was hired on May 12, 1972, prior to Trotter's interview (Plf's

Ex. 2, Vol. IX, p. 110) and three were hired in 1973 (Plf's Ex. 2, Vol. VI, p. 214; Vol. IX, p. 250; and Vol. X, p. 372). Of the physical education teachers hired during 1972, several had held high school coaching positions in addition to their regular teaching experience (Plf's Ex. 2, Vol. II. p. 252; Vol. VIII, p. 440; and Vol. X, p. 175). Others were rated "first choice of all applicants" on the basis of their interviews with the principal of the school for which they were chosen. (Plf's Ex. 2, Vol. I, p. 102; Vol. III, p. 337; Vol. VII, p. 431).

Timotheus Carson also appeared in court and claimed witness fees but did not testify. The record shows that he applied on April 6, 1972, for a secondary English, French and German teaching position with Hazelwood (Plf's Ex. 4). He was given an interview the following day with the department chairman, who noted that Carson was interested in a phase elective program. Based upon his application Carson appears to be well qualified, but he stated that he expected to receive "no less than" his current salary of $11,500.00.

The twenty-eight other applicants for 1972 and 1973, whose records were offered by plaintiff, were not interviewed. Ten of the twenty-eight were subpoenaed for trial and received witness fees but did not testify. Out of the twenty-eight there were thirteen elementary teachers with no area of specialization, three social studies teachers, four math and science teachers, three physical education teachers, one band teacher, one home economics teacher, one counselor, one special education teacher and one Spanish teacher. Nine of these had no Missouri certification at the time they applied (Plf's Exs. 13, 28, 29, 36, 37, 41, 42, 46 and 47), and another applicant lacked certification in her area of specialization (Plf's Ex. 10). Four others did not fill out an application with the Hazelwood district until the middle or latter part of August (Plf's Exs. 3, 32, 43 and 65), which was after all teachers for the coming school year had been hired.

Prior to the Brown I decision (Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873), handed down by the U.S. Supreme Court in 1954, Missouri, as well as other states, required that schools be segregated. In November of that year the Hazelwood Board of Education instructed the superintendent to admit any black children found residing in the district, but "in view" of the fact that they would be "so decidedly in the minority", to offer to pay their tuition to a district having a predominantly black enrollment. Plaintiff relying on Bradley v. School Board, 382 U.S. 103, 86 S.Ct. 224, 15 L.Ed.2d 187 (1965) and Rogers v. Paul, 382 U.S. 198, 86 S.Ct. 358, 15 L.Ed.2d 265 (1965), contends that these facts standing along demonstrate the operation of a dual school system in Hazelwood, and that the failure to hire any black faculty members prior to 1969 shows a lack of affirmative action to overcome previous discrimination.

Plaintiff's evidence falls far short of establishing that a dual school system ever existed in Hazelwood. The district was not formed until a few years prior to the Brown decision, and there were no black students enrolled in the Hazelwood system during the period of state-mandated segregation in Missouri, since it was not until the meeting of the Board of Education on November 20, 1954, that school officials were even informed that any black residents had moved into the district. The policy adopted by the Board at that meeting was not a policy of mandatory transfer and would in any case have had a de minimus effect, given the small size of the district at that time and the small number of black students who might have been involved.

Nor is there any evidence of racial assignment of either students or faculty during any of the years for which plaintiff introduced evidence. During the 1970-71 school year blacks were enrolled in 20 out of 22 of the schools in the district (Plf's Ex. 55), and the largest number of blacks in any one school in that year was an enrollment of 41 blacks out of a total of 862 students. As late as 1973, when 22

black teachers were hired, only one black teacher was assigned to the school with the highest number of black students (Plf's Ex. 55). The Fourteenth Amendment does not require maintenance of precise racial balance of faculty. United States v. Montgomery County Board of Education, 395 U.S. 225, 236, 89 S.Ct. 1670, 23 L.Ed.2d 263 (1969).

The 1970 census shows that there are 19,425 elementary and secondary teachers in St. Louis City and County, of which 2,997, or 15.4% are black (Plf's Ex. 75). Plaintiff seeks thereby to establish a prima facie case of racial discrimination by pointing to the comparatively small ratio of black teachers (approximately 2% in 1973) employed by the Hazelwood district, and requests the Court to impose a mandatory hiring quota based upon the average ratio of black teachers employed in all of the school districts of St. Louis City and county combined.

While plaintiff in this case argues in its brief that the black teacher ratio of St. Louis City and County combined should control, plaintiff's expert witness testified at the trial that the St. Louis City school district attempts to maintain a teacher ratio based upon the race of students or population within the City district itself, rather than the makeup of the entire St. Louis Metropolitan area. Consistent with the racial mix of this area's population there is a much higher ratio of black teachers in St. Louis City than in the County. The black population in the city is 254,268 out of a total population of 622,234 (Plf's Ex. 53 [1970], Tables 81, 125), or approximately 40%. Of the 19,425 teachers in St. Louis City and County, 5,238 are employed in the city district, and 2,182 of these, or about 40%, are black (Plf's Ex. 53 [1970], Tables 122, 127).

The 45,579 black persons living in St. Louis County are less than 5% of the total population of around one million (Plf's Ex. 53, Tables 81, 125). Black teachers in St. Louis

County, which includes the Hazelwood district, number 815 out of 14,187 total teachers (Plf's Ex. 53 [1970], Tables 122, 127), or approximately 5.73%. Thus, the figure of 15% black teachers, against which plaintiff seeks to compare the Hazelwood district's employment record, is distorted by the inclusion of data from the St. Louis City district, which contains a much higher ratio of black teachers and a much larger black population.

While a great disparity in the ratio of black to white faculty as compared to the ratio of black to white students within a particular school district may provide evidence of racial discrimination, Jackson v. Wheatley School District No. 28 of St. Francis County, Arkansas, 430 F.2d 1359, 1363 (CA8 1970); Armstead v. Starkville Municipal Separate School District, 325 F. Supp. 560, 569 (N.D.Miss.1971), aff'd 461 F.2d 276 (CA5 1972), this Court has found no authority to suggest that a school district may be guilty of violating Title VII for failing to maintain a ratio of black teachers based upon the racial makeup of all teachers in the geographic area from which that district might conceivably draw its employees.

The number of black teachers employed by the Hazelwood district is undeniably meager. Nonetheless, it has kept pace with the small but steadily increasing black enrollment in the district. For the 1970-71 school year the six black teachers hired by the Hazelwood district comprised less than one percent of its total faculty. However, the number of black students enrolled during that period was likewise only one percent of the total district attendance. In 1973 the ratio of black teachers increased to 2%, consistent with a black enrollment in that year of 576 out of 25,166 total students. These figures do not establish the existence of statistical discrimination within the Hazelwood district.

In determining the validity of Hazelwood's employment procedures, this Court is not without guidance. The unique problems which arise in the area of teacher employment have been thoroughly explored in previous decisions of this circuit. The case of Smith v. Board of Education of Morrilton Sch. Dis. No. 32, 365 F.2d 770 (CA 8 1966) involved the closing of a formerly all black high school and dismissal of its black teaching staff following forced integration of the defendant school district. None of the dismissed teachers was considered by district officials to be qualified to teach in the newly integrated high school. This decision was based upon numerous subjective factors in addition to the teachers' "paper qualifications" such as academic degrees and experience. In regard to the defendant's reliance on subjective employment factors, the Court in Smith stated at pages 781-782:

> "We recognize that teaching is an art and that excellence does not depend upon knowledge, experience, formal training and classroom conduct alone. Fitness for teaching rests upon a broad range of factors and encompasses numerous personality and character traits. * * * In addition, the particular needs of a school district may at times genuinely require that weight indeed be given to an applicant's ability to teach more than one subject, or, in addition to teaching, to supervise extracurricular activity. Nothing contained in this opinion is intended to be restrictive of a school board's freedom to make full inquiry and to give due consideration to an applicant's qualifications and the district's needs in filling vacancies so long as the board does not act unreasonably, arbitrarily, capriciously, or unlawfully. * * * However, in this day race per se is an impermissible criterion for judging either an applicant's qualifications or the district's needs."

The Court held in *Smith* that the dismissed teachers had been discriminated against because in addition to con-

sidering the valid factors referred to above the defendant placed major emphasis on purely racial factors such as the inability of black teachers to "understand many of the problems of white pupils" due to their different environment, and the "differing speech patterns" possessed by black teachers. 365 F.2d at page 781.

In the recent case of Moore v. Board of Ed. of Chidester Sch. Dist. No. 59, Ark., 448 F.2d 709 (CA 8 1971), the Eighth Circuit established general guidelines to be applied in determining the validity of a school district's employment procedures. At page 713 of that opinion the Court stated:

> "We concede that there is some ambiguity in the decisions of this Court as to whether the standards must be objective. * * * To reconcile these decisions, we now make clear that a board of education is obligated to use objective nondiscriminatory standards in the employment, assignment and dismissal of teachers. A board may also consider established and previously announced nondiscriminatory subjective factors in making such decisions."

Although *Smith* and *Moore* dealt only with the dismissal of black teachers, the broad principles announced in those decisions are clearly intended to be applicable to selection of incoming teachers as well. When considered in light of the above decisions, this Court does not find fault of any constitutional magnitude with respect to the employment procedures currently in use in Hazelwood.

The first step in Hazelwood's employment process is the review of each application by the personnel office to insure that the applicant has a health certificate and Missouri certification to teach. Teaching certification has previously been held to be a valid nondiscriminatory standard, Moore v. Board of Ed. of Chidester Sch. Dist. No. 59, Ark. supra; Jackson v. Wheatley Sch. Dist. No. 28 of St. Francis Co.,

Ark., 430 F.2d 1359 (CA 8 1970), and the requirement of a health certificate is a similarly objective standard.

As in other districts of similar size, most of Hazelwood's interviewing is left to the principal of each individual school. It appears that his recommendation is approved by the superintendent in virtually every case. Because of the fact that the district is so large, school officials should be encouraged to develop and publish standard guidelines for employment of teachers in order to minimize the possibility that an individual interviewer might abuse the broad discretion which he currently possesses. Nonetheless, although the only instruction now given to those responsible for conducting interviews is to obtain the "most competent" teacher or administrator, substantial uniformity is achieved throughout the district by the use of standard application and interview forms which set forth the factors which are taken into account in making the hiring decision. Many of these factors, such as prior experience, prior student teaching or substitute teaching at Hazelwood, knowledge of subject area and knowledge of teaching skills, are clearly objective. Others, such as knowledge of children, appear on their face to be subjective, but are based upon objective information supplied by the applicant, such as participation in youth groups. None of the standards used could be said to involve racial distinctions, as was the case in Smith v. Board of Education of Morrilton Sch. Dist. No. 32, supra. Subjective factors such as personal appearance, confidence, disposition, philosophy of education and handling of particular discipline problems are all common, established considerations in the employment of teachers, and therefore do not violate the test set forth in Moore v. Board of Ed. of Chidester Sch. Dist. No. 59, Ark., supra.

The only substantial difference between the hiring procedures used at Hazelwood and those suggested by plaintiff's expert, Mr. Young, is that the St. Louis City district superintendent may specifically request that a

black or white teacher be selected for a particular position in order to maintain the desired racial balance.

The Court now turns to the evidence concerning black applicants who were not offered teaching positions with the Hazelwood district. The burden of proving that defendants' failure to hire these applicants constituted a pattern of intentional employment discrimination is on the government. United States v. Jacksonville Terminal Company, 451 F.2d 418, 442-443 (CA 5 1971), cert. den. 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972). The Court has not found any basis in the record before it for concluding that defendants acted in a discriminatory fashion in failing to hire these fifty-five black applicants during 1972 and 1973.

Several of the twenty-five applicants who testified at the trial that they were not interviewed, including Judith Ealy, Pearlie Boyd, Willie Palmer and Charlene Catlin, did not meet Hazelwood's standard requirements for positions for which they applied. At least two, Nikki Lenoir and Cullen Cook, although they may have been qualified did not apply until a week or two prior to the date on which school was to commence. Both Lenoir and Cook frankly admitted that they were not surprised to learn that there were no vacancies remaining at that time. Several other witnesses testified that they were actually called by Hazelwood with regard to employment, but had already accepted positions with other districts.

A number of witnesses who applied as teachers in areas for which there were no vacancies stated that they were aware of the great competition for teaching positions. This competition is particularly intense in certain areas of teaching. For example, Derek Novel testified that his field, social studies, "is one of the more competitive fields in teaching today."

Atry Cotton applied for a position as special education teacher at Hazelwood. Although plaintiff claims that

Hazelwood's failure to hire him was discriminatory, plaintiff stipulated that the Hazelwood district does not even have a special education department, since St. Louis County has centralized such services at a separate location.

With regard to those black teachers who testified that they were interviewed but not offered a position, a review of the qualifications of those teachers ultimately selected for each position shows that in every case where a comparison is possible the district's choice is readily explainable on valid, nondiscriminatory grounds.

The teachers chosen to fill the vacancies for which Beverly Ellis and Sandra Reid interviewed had served as student or substitute teachers with the Hazelwood district, a qualification which frequently results in one candidate being chosen over the large number of other applicants for a particular position. Furthermore, Mrs. Reid was offered a job prior to the commencement of the 1973-74 school year but had previously accepted employment with another district.

Patricia Fletcher testified to an impressive scholastic record. However, the academic credentials of the applicant chosen for the position for which Fletcher was interviewed were equally impressive. She was a former graduate of Hazelwood High School, and the district had tried previously to hire her.

Charlene Catlin appears to have been an excellent teacher candidate, but she did not have a vocational home economics certificate, a prerequisite for all home economics teachers at Hazelwood.

Lonnie Lockett was told that the district wanted industrial arts teachers who had experience with electricity or power mechanics. The evidence shows that this standard was not applied in a discriminatory fashion, since most of the industrial arts teachers hired in the year Lockett was interviewed had the desired experience in electronics. Of the

other two industrial arts teachers hired, one, although lacking an electronics background, was recommended based on an outstanding student-teaching performance at Hazelwood.

Alberta Riggs was not recommended for a teaching position partially because of her criticism of Hazelwood's policies. In addition, a review of her transcript showed that she was not qualified for the reading position for which she was interviewed, although the black teacher who accompanied Mrs. Riggs to her interview was qualified and was subsequently hired by the district.

The Court has thoroughly reviewed the records of the remaining twenty-eight applicants who did not testify, and has found no evidence of discriminatory treatment of these applicants either. It appears that the problem actually underlying most of the black teachers who have applied to Hazelwood during the past two years is the same one which plagues every applicant in the teaching profession today—an overabundance of qualified teachers. During recent years the Hazelwood school district has had to turn away applicants at the rate of two to three thousand per year. These fifty-five black teachers who applied in 1972 and 1973 in reality are but a very small portion of the total number who applied unsuccessfully for positions in those years.

Since plaintiff has failed to prove the existence of any pattern or practice of racial discrimination in the employment of teachers at the Hazelwood school district, imposition of an affirmative recruitment program is not appropriate. Furthermore, as pointed out above, the numerical hiring quotas which plaintiff seeks to impose are contrived from census data encompassing the entire St. Louis Metropolitan area and bear no relation whatsoever to the racial characteristics of the Hazelwood district.

This memorandum opinion is adopted by the Court as its findings of fact and conclusions of law, and the clerk is

directed to prepare and enter the proper order of judgment in favor of the defendants.

JUDGMENT

In accordance with the Memorandum and Order of the Court this day filed which is incorporated in and made a part of this judgment;

It is hereby ordered and adjudged that judgment be and is hereby entered in favor of defendants and against plaintiff.

APPENDIX B

UNITED STATES of America,
Appellant,

v.

HAZELWOOD SCHOOL DISTRICT, et al.,
Appellees.

No. 75-1422.

United States Court of Appeals,
Eighth Circuit.

Submitted Jan. 12, 1976.

Decided April 20, 1976.

Rehearing and Rehearing En Banc
Denied May 25, 1976.

Before GIBSON, Chief Judge, CLARK, Associate Justice, Retired,* and BRIGHT, Circuit Judge.

Mr. Justice CLARK.

The Attorney General brought this suit on August 9, 1973, in the name of the United States, under Title VII of the Civil Rights Act of 1964[1] and the Fourteenth Amendment to the Constitution, alleging racial discrimination in the employment practices of the Hazelwood School District (Hazelwood) in St. Louis County, Missouri. The Superintendent and Board of Education of Hazelwood were also parties defendant. Jurisdiction was invoked under Section 707 of the Civil Rights Act of 1964, 42 U.S.C. §2000e-6, which authorizes the Attorney General to bring suit

* The Honorable Tom C. Clark, Associate Justice, Retired, Supreme Court of the United States, sitting by designation.

[1] 42 U.S.C. § 2000e *et seq.* (1970), *as amended*, 42 U.S.C. § 2000e *et seq.* (Supp. II, 1972).

whenever he has reasonable cause to believe that any person has engaged in a pattern or practice of resistance to the full enjoyment of the rights secured by Title VII of the Act.

In its complaint, the United States alleged that prior to 1955, Hazelwood employed no black faculty or staff in accordance with existing Missouri law which mandated racially segregated schools, and that since that time Hazelwood has continued to pursue such a pattern or practice of racial discrimination in employment by failing to employ black applicants who were as well or better qualified to teach than the white applicants who were actually employed. Injunctive relief was sought to require Hazelwood (1) to cease using discriminatory practices; (2) to take affirmative action to recruit black faculty and staff; and (3) to provide for back pay to those black applicants who were rejected because of such discriminatory patterns or practices. The district court held that the United States failed to prove that Hazelwood had engaged in discriminatory practices in violation of Title VII and the Fourteenth Amendment and denied any relief. *United States v. Hazelwood School District*, 392 F.Supp. 1276 (E.D.Mo.1975).

The United States claims that the court erred: (1) in failing to give any weight to Hazelwood's admitted pre-Title VII discrimination, (2) in applying an erroneous legal standard in determining that the United States had not demonstrated a statistical disparity between the racial composition of Hazelwood's work force and the relevant labor market; (3) in failing to recognize the relationship between the statistical evidence of discrimination and Hazelwood's standardless hiring practices; and (4) in holding that the United States had failed to prove that individual black applicants were rejected on account of race. The United States argues that it established, both by affirmative evidence and statistical summaries, a *prima facie* case of racial discrimination which shifted to Hazelwood the burden of

proving that it had not engaged in any unlawful discrimination.

We have concluded that, from its establishment in 1949-1951 until at least March 1974, Hazelwood has engaged in a pattern or practice of discriminatorily failing and refusing to hire blacks in violation of the Act, and that the United States and certain black teaching applicants are entitled to relief.

I. HAZELWOOD'S RECORD ON MINORITY HIRING

The Hazelwood School District occupies 78 square miles of territory and serves some 25,000 students, predominantly white, in some five communities in northern St. Louis County. The district borders for a short distance the St. Louis City School District. Prior to the United States Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), the Constitution of the State of Missouri mandated racially segregated schools. Mo.Const. Art. IX, § 1(a) (1945).

Before *Brown*, the school districts in St. Louis County assigned black faculty to black schools exclusively and white faculty only to white schools. Because no blacks lived in the Hazelwood District prior to 1954, the District did not operate a black school. Accordingly, Hazelwood employed no black faculty in its schools. Hazelwood's teacher application forms prior to 1954 contained a space for identification of race, as well as one for a photograph; indeed, as late as the 1962-63 school year, some of the forms continued to have a space for designation of race. As late as 1962 an advertisement appearing in the Clarion-Ledger Jackson Daily News of Jackson, Mississippi, solicited applications for "Kindergarten and Elementary teachers (white only)". Sometime prior to 1964, Hazelwood adopted a policy "to hire all teachers on the basis of training, preparation and recommendations, regardless of race,

color or creed." However, no black teacher was hired by Hazelwood until 1969.

In the past, Hazelwood has recruited teachers from predominantly white colleges and universities throughout Missouri, Illinois, Arkansas, Kansas and Oklahoma. No recruitment was done from either of the two predominantly black colleges in Missouri, Harris Teachers College and Lincoln University; nor did Hazelwood recruit from predominantly black colleges in any other state. There was also evidence presented at the trial concerning 55 black teachers who had applied at Hazelwood for positions but had been rejected. Twenty-five of these applicants testified in the case. The appellant sought to prove that in each instance, vacancies in the applicant's special field were filled by whites with less or no better qualifications.

Statistical information introduced by the United States demonstrated that Hazelwood employed only one black in 1969, and six blacks (0.6 percent of the total teachers in the district) in 1970-71. Thirteen blacks were employed out of a total of 1,197 teachers (1.1 percent) in 1972-73. During the 1973-74 school year, Hazelwood employed 22 black teachers out of a total of 1,231 (1.8 percent). In St. Louis City and County, however, over 15 percent of the teachers were black in 1970.

Hazelwood's hiring procedures may well be the crux of the problem. It uses virtually no standards in making its selections. Applicants complete an application form which is filed in the central personnel office. Each year all applicants are requested to update their forms, and those not updated are destroyed. An applicant must be interviewed to be hired. When a vacancy is anticipated or occurs, the principal of the school involved notifies the personnel office, and the director of the latter office then selects applicants in the relevant field from the application cards. Those selected are notified to arrange for interviews with the employing principal. When an application is filed, it is the

practice of the personnel officer merely to check the eligibility of the applicant under Missouri certification requirements.[2]

Upon receipt of a request from a principal to employ a new teacher, the director of the personnel office usually notifies those applicants who have recently come to the attention of the office or have kept the office advised of their continuing availability.[3] Groups of applicants generally

[2] Although Hazelwood requires that a teacher hold a valid certificate before he or she enters the classroom, frequently the District makes offers of employment to persons before they have obtained certificates. At the deposition taken on February 14, 1974, the United States questioned Clifford Kirby, Superintendent of Hazelwood's Schools from 1953 until the middle of 1967, about this practice:

> Q. For someone who is a new graduate and perhaps has not yet been certified by the school or by the School Board, would you hire them prior to their actually receiving the actual certificate?
>
> * * * * * *
>
> A. If you will look on the contract which is prescribed by the State of Missouri, it has all the various sections relative to the employment of teachers. One of the sections there is that before they can enter into a classroom they must have a valid certificate. When they sign that contract, that contract becomes invalid if they can't produce to the school a valid certificate on the opening day of school.
>
> Q. But they would be hired?
> A. Certainly we hired graduates before they would graduate, with the understanding that they would be graduating and would have a certificate to teach.

Evidence was admitted at trial which listed 101 Hazelwood teachers who were not certified at the time they applied but were subsequently hired. Fifty-three of these teachers had not received their certification at the time they were offered employment.

[3] Forty-five of the 55 black applicants for whom the Government is seeking relief were eliminated at this stage of the application process by never being interviewed. Mr. J.W. Hord, Director of Personnel for

(continued)

meet with Hazelwood's secondary or elementary coordinator, who describes the District to them, and the respec-

[3] (continued)
Hazelwood, was asked about the process of selecting applicants for interviewing:

> Q. You said twelve years ago you used to try to interview everyone that applied?
> A. No I didn't say that. I said we used to contact everyone to tell them there was a vacancy.
>
> Q. And now you attempt to contact who for a vacancy?
> A. The people that have notified us that they were available for a position and the ones that we are sure are available, these are the first ones we contact.
>
> Q. Okay. How do you mean persons have notified you to say they are available?
> A. Because we have people who are constantly calling the office advising us of their availability.
>
> Q. So you would select for or arrange interviews with the persons that have called the office and asked, been continually asking for interviews? They would be first?
> A. This is part of it.
>
> Q. Alright, who else would be included among those contacts?
> A. Those people who were rather recent applicants.
>
> Q. Anyone else?
> A. And if we have enough openings, we would attempt to contact a greater number of the people depending on the teaching area.
>
> Q. Okay. How many people do you like on interview for each particular vacancy?
> A. It depends on the coordinator and the principal. Both may decide we only want six or seven, or three or four; or ten.
>
> Q. So, if I understand you correctly, to select or interview you would check to see if the person was certified or appeared that he would be certified and then you select from those persons the persons who have notified the Hazelwood district that they are available for employment and by notification I mean other than submitting the application?
> A. Right.

tive school principal then interviews individually the applicants referred from the personnel office. The principal thereafter suggests a choice to the coordinator, who, in turn, makes a recommendation to the Superintendent. As a general rule, the choice of the principal is determinative. The principals are given no guidance as to how to select teachers beyond the general instruction to hire the "most competent" person available. Since there are 23 principals in Hazelwood, there are 23 different hiring standards within the general instruction of the Board to hire the "most competent" applicant. The Superintendent of Hazelwood testified that no standards had been developed; that the philosophy is that "the principal should have the leeway to employ the most competent people that he knows of or that he can find for the position"; that with regard to the efficacy of such a selection method "we have not conducted any studies along this line." The former Superintendent testified that Hazelwood "had no objective measurements other than your subjective opinions of the person hooked onto the recommendations and their file from the placement office." The Coordinator of Secondary Education for Hazelwood testified that he had been given no standards other than to hire "the best candidate for the position." The only minimum uniform standard applied in Hazelwood's hiring process is that a candidate must possess a health certificate and a Missouri Teachers Certificate prior to the first day of classes.

To rebut the Government's case, Hazelwood relied almost entirely upon its cross-examination of the Government's witnesses. Hazelwood introduced only one witness and several exhibits of its own. The witness testified to the total number of teachers who applied and were hired during the 1971-72 and 1973-74 school years — 3,127 of which 234 were hired in 1971-72 and 2,373 of which 282 were hired in 1972-73. The exhibits consisted of the policy manual, policy book, staff handbook, and historical summary of the formation of the Hazelwood School District.

Hazelwood argued that no discrimination could be proved because equal employment opportunity was the official policy of the District and because the small number of its black teachers was comparable to the small number of black students enrolled in Hazelwood's schools.

II. PRIMA FACIE SHOWING OF DISCRIMINATION

The district court held that the United States failed to prove that the defendants had engaged in discriminatory hiring practices in violation of Title VII and the Fourteenth Amendment. We disagree. Evidence was adduced at trial demonstrating (1) a history of discriminatory practices in the hiring of teachers by Hazelwood prior to the effective date of Title VII,[4] (2) a statistical disparity between the proportion of blacks in Hazelwood's workforce and the proportion of blacks in the labor market,[5] (3) an unstructured decentralized hiring process in which subjective criteria predominate in evaluating candidates, and (4) specific discrimination against 16 black applicants for teaching positions at Hazelwood. After considering this evidence, we conclude that a *prima facie* case of discrimination was made out by the Government.

[4] Title VII of the Civil Rights Act of 1964 took effect on July 2, 1965. It was amended to apply to public employers such as the Hazelwood School District effective March 24, 1972, Equal Employment Opportunity Act of 1972, Pub.L. No. 92-261, § 2, 86 Stat. 103, *amending* 42 U.S.C. § 2000e(f) (1970).

[5] Some caution is necessary when using statistical evidence to analyze such disparities in employment figures for professional and academic positions. The raw data often will obscure the actual number of persons in the general workforce, white and black, who possess the special qualifications needed for particular openings. Here the problem has been minimized by the use of data from surrounding school districts (where the average number of black teachers is as high as 15%), the size of the disparity (2% as compared to 15%), and the presence of other indicia of discrimination.

Proof of racial discrimination in the hiring of teachers prior to the effective date of Title VII included evidence that prior to 1954, Hazelwood employed no black teachers in its all-white schools in accordance with the custom in the county; that from the time that Hazelwood's schools were integrated in 1969, it employed no black teachers; that Hazelwood placed newspaper advertisements for "white only" teachers in 1962; and that Hazelwood officials have never recruited from any predominantly black college,[6] although they did recruit from predominantly white universities in Missouri and elsewhere. The district court gave little, if any, weight to this evidence, even though it is highly relevant to show that present policies or practices, which appear neutral on their face, perpetuate past discriminatory practices. *United States v. T.I.M.E.—D.C., Inc.*, 517 F.2d 299 (5th Cir. 1975); *United States v. Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971); *United States v. Sheet Metal Workers, Local 36*, 416 F.2d 123 (8th Cir. 1969).

"In the problem of racial discrimination, statistics often tell much, and Courts listen." *Alabama v. United States*, 304 F.2d 583, 586 (5th Cir.), *aff'd per curiam*, 371 U.S. 37, 83 S.Ct. 145, 9 L.Ed.2d 112 (1962). Courts frequently have inferred from statistical evidence the existence of a pattern or practice of discrimination. There is virtual unanimity on the proposition that the showing of a statistical disparity between the proportion of blacks in the employer's workforce and the proportion of blacks in the relevant labor market makes out a *prima facie* case of discrimination in violation of Title VII. *Rodriguez v. East Texas Motor Freight*, 505 F.2d 40, 53 (5th Cir. 1974); *United States v. Wood Lathers, Local 46*, 471 F.2d 408, 414 n.11 (2d Cir.),

[6] In 1963 or 1964, J.W. Hord, personnel director for the Hazelwood schools, made one visit to Lincoln University, a predominantly black university in Missouri. He spoke with the placement director there but did not interview any teaching candidates.

cert. denied, 412 U.S. 939, 93 S.Ct. 2773, 37 L.Ed.2d 398 (1973); *United States v. Chesapeake and Ohio Ry. Co.*, 471 F.2d 582, 586 (4th Cir. 1972), *cert. denied*, 411 U.S. 939, 93 S.Ct. 893, 36 L.Ed.2d 401 (1973); *Rowe v. General Motors Corp.*, 457 F.2d 348, 357 (5th Cir. 1972); *United States v. St. Louis-San Francisco Ry. Co.*, 464 F.2d 301, 307 (8th Cir. 1972); *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971), *modified on rehearing, en banc*, 452 F.2d 327, *cert. denied*, 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 338 (1972).

In the present case, the district court found that the United States had failed to establish a *prima facie* case of discrimination on the basis of statistical evidence. However, the record shows that it offered evidence showing that no black teachers were on the Hazelwood faculty until 1969, and that during the 1970-71 school year, it employed only six black teachers out of a staff of 957 (0.6 percent); and by the end of the 1972-73 school year, although Hazelwood's teaching staff numbered 1,107, only 16 (1.1 percent) were black. During the 1973-74 school year, 22 (1.8 percent) of Hazelwood's teaching staff of 1,231 were black. In contrast, over 15 percent of the teachers in the relevant geographical area — St. Louis City and County[7] — were black in 1970. The district court concluded that this evidence did not constitute a *prima facie* showing of employment discrimination since less than two percent of the students in the Hazelwood schools are black.

[7] We accept the Government's contention that St. Louis City and County is the relevant labor market area for our consideration. The relevant labor market area is that area from which the employer draws its employees. *United States v. Ironworkers Local 86*, 443 F.2d 544, 551 n. 19 (9th Cir. 1971). Of the 176 teachers hired by Hazelwood between October, 1972, and September, 1973, approximately 80 percent resided in St. Louis City and County at the time of their initial employment. Approximately one-third of the teachers hired during this period resided in the City of St. Louis and 40 percent resided in areas of St. Louis County other than the Hazelwood District.

It stated:

> The number of black teachers employed by the Hazelwood district is undeniably meager. Nonetheless, it has kept pace with the small but steadily increasing black enrollment in the district. For the 1970-71 school year the six black teachers hired by the Hazelwood district comprised less than one percent of its total faculty. However, the number of black students enrolled during that period was likewise only one percent of the total district attendance. In 1973 the ratio of black teachers increased to 2%, consistent with a black enrollment in that year of 576 out of 25,166 total students. These figures do not establish the existence of statistical discrimination within the Hazelwood district.

392 F.Supp. at 1287-1288.

The district court erred in comparing the percentage of black teachers in Hazelwood with the percentage of black students in its schools rather than with the percentage of black teachers in the relevant labor market area. The law is well-settled that the relevant consideration in an employment discrimination case is the statistical disparity between the proportion of blacks in the employer's workforce and the proportion of blacks in the labor market. *See, e.g., United States v. Hayes International Corp.*, 456 F.2d 112 (5th Cir. 1972); *Carter, supra*, 452 F.2d 315; *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970). The level of black student enrollment in Hazelwood school sheds no light whatsoever upon the dispute before us, and the district court clearly erred in absolving Hazelwood of unlawful employment practices on the basis of the paucity of black students in the Hazelwood schools.

The demonstrated statistical disparity between the racial composition of Hazelwood's workforce and the relevant labor market is particularly revealing when considered in

light of Hazelwood's subjectively-based selection procedures. In Hazelwood, the district court found, each principal is vested with almost total discretion in hiring teachers for his school. All of the elementary and secondary school principals in Hazelwood are white. The only guidance that these principals receive from their superiors is the instruction to select the "most competent" person available. Principals are free to give whatever weight they desire to subjective factors in making their hiring decisions. Indeed, one principal testified that interviewing an applicant was "like dating a girl, some of them impress you, some of them don't." As noted by the district court, the principals all use identical interview forms which contain spaces for evaluation of an applicant's personal attributes, including personal appearance, knowledge of subject area, confidence, personality, and the like. Yet we find no evidence to support the court's finding that through the use of these forms "substantial uniformity" in hiring decisions "is achieved throughout the district." 392 F.Supp. at 1289. In fact, no evidence was presented which would indicate that any two principals apply the same criteria — objective or subjective — to evaluate applicants. In our view, it is more than mere coincidence that the use of such procedures produced only a few black teachers.

These hiring procedures are similar in many respects to the promotion procedures considered in *Rowe v. General Motors, supra*, 457 F.2d 348. In *Rowe*, a unanimous court of appeals condemned a promotional system in which:

> (i) The foreman's recommendation is the indispensable single most important factor in the promotion process.
>
> (ii) Foremen are given no written instructions pertaining to the qualifications necessary for promotion. * * *

> (iii) Those standards which were determined to be controlling are vague and subjective. * * *

457 F.2d at 358-359.

This promotional system, the court of appeals noted, was highly susceptible to the abuses of racial discrimination:

> * * * [P]romotion/transfer procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman are a ready mechanism for discrimination against Blacks much of which can be covertly concealed and, for that matter, not really known to management. We and others have expressed a skepticism that Black persons dependent directly on decisive recommendations from Whites can expect non-discriminatory action.

Rowe v. General Motors Corp., supra, 457 F.2d at 359 (citations omitted). The hiring procedures used by Hazelwood are similarly susceptible to discrimination. Vague and subjective criteria may disguise discriminatory practices, whether or not that was the original intent. If hiring criteria "operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability," then the absence of discriminatory intent will not serve to redeem them. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 91 S.Ct. 849, 854, 28 L.Ed.2d 158, 165 (1972). Because Hazelwood's hiring procedures have spawned a disproportionately white faculty, we view them with skepticism.

The law does not preclude Hazelwood from considering previously announced, non-discriminatory, subjective criteria in deciding whom it will hire, *Moore v. Bd. of Educ. of Chidester*, 448 F.2d 709, 713 (8th Cir. 1971), as long as such factors are shown to be related to job performance. *Griggs, supra*, 401 U.S. at 431, 91 S.Ct. at 853, 28 L.Ed.2d at 164. However the law in this Circuit is clear that employment decisions based on subjective standards carry lit-

tle weight in rebutting charges of discrimination. *Green v. McDonnell Douglas Corp.*, 463 F.2d 337, 352 (8th Cir. 1972), *modified*, 411 U.S. 792, 803, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668, 678 (1973); *Moore, supra*, 448 F.2d at 713. The Fourth Circuit is in agreement:

> Elusive, purely subjective standards must give way to objectivity if statistical indicia of discrimination are to be refuted. * * *
>
> [I]n the absence of objective criteria applied to all workers alike, the statistics indicate that race is the only identifiable factor explaining the disparity between the jobs held by white employees and those held by black employees. The proof discloses no objective standards based on education, experience, ability, length of service, reliability, or aptitude to account for the preferential employment of white workers. * * *
>
> [I]n sum, the lack of objective guidelines for hiring and promotion and the failure to post notices of job vacancies are badges of discrimination that serve to corroborate, not to rebut, the racial bias pictured by the statistical pattern of the company's work force.

Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377, 1382-1383 (4th Cir.), *cert. denied*, 409 U.S. 982, 93 S.Ct. 319, 34 L.Ed.2d 246 (1972) (citations omitted).

We hold that statistical evidence demonstrating a disparity between the proportion of blacks in Hazelwood's workforce and the proportion of blacks in the relevant labor market, when considered in light of Hazelwood's hiring procedures involving the use of vague and subjective criteria, indicate a *prima facie* case of a pattern or practice of employment discrimination in violation of Title VII. Buttressing this aspect of the Government's proof is evidence of actual discriminatory practices in the hiring of teachers during the period prior to the effective date of Title VII and in the rejection of some 16 black applicants discussed

below. The Government's proof thus established a *prima facie* case. Hazelwood offered no evidence adequate to rebut the inference of discrimination created by the aforementioned evidence. We therefore reverse the judgment of the district court.

III. DISCRIMINATION AGAINST SPECIFIC INDIVIDUALS

The United States argues that 55 qualified black applicants for teaching positions in the Hazelwood schools were refused employment on the basis of race. Twenty-five of these applicants testified at trial. The Government offered documentary evidence from Hazelwood's personnel files to show that subsequent to the application of each of the 55 blacks, vacancies in the applicant's field were filled by whites with less or no better objective qualifications than those of the black applicants. The district court ruled, however, that there was no basis in the record for concluding that Hazelwood acted in a discriminatory fashion in failing to hire the 55 applicants.

The United States contends that the district court erred in so holding and requests back pay and other appropriate injunctive relief for those applicants who were refused employment on the basis of race. We believe that for an applicant to be entitled to specific relief, the United States had the burden at trial of establishing a *prima facie* case of racial discrimination against him or her. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), the Supreme Court held that a private, non-class-action

> * * * complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which

the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802, 93 S.Ct. at 1824, 36 L.Ed.2d at 677.

This four-pronged test, we think should be applied to the 55 applicants before us even though this is not a private action, but rather one brought by the Attorney General. *See, E.E.O.C. v. Detroit Edison Co.*, 515 F.2d 301, 316 (6th Cir. 1975). Subsection (iv) is satisfied here by a showing that within a reasonable time after application, vacancies in the applicant's field were filled by whites with less or no better qualifications than those of the black applicant. The only applicants entitled to specific relief are those for whom the Government has established a *prima facie* case by satisfying the test, and whose *prima facie* case was not rebutted by defendants.

The district court made specific findings regarding 41 of the 55 rejected black applicants. We shall examine these findings with regard to each applicant, applying the standard articulated in *Green, supra*, 416 U.S. at 802, 93 S.Ct. at 1824, 36 L.Ed.2d at 677. Of course, the findings of fact made by the district court are entitled to full credit before this court, except for those that the record reveals to be clearly erroneous. Fed.R.Civ.P. 52; *Barryhill v. United States*, 300 F.2d 690, 693-694 (8th Cir. 1962). Ordinarily, where we reverse a district court's interpretation of the law applicable to a set of facts, it is appropriate simply to remand the injured parties to the district court for further relief. In this instance, however, we believe that a review of the specific findings on 41 of the applicants serves both the interests of justice and judicial economy by hastening relief for those discriminated against, and by preventing further litigation of the claims for which no *prima facie* case has been made.

We hold that the following applicants established a *prima facie* case of discrimination which was not rebutted by Hazelwood and that they are entitled to specific relief:

1. Derek Novel applied for a position as a junior or senior high social studies teacher on January 31, 1973. Novel had an outstanding academic record, had experience as a student teacher, and had travelled widely. Hazelwood informed Novel on several occasions that there were no vacancies in his field and never interviewed him. Evidence produced by the Government, however, showed that 10 persons applying after Novel for the same position were subsequently hired. At least five of these persons had teaching experience comparable to, or lesser than that of Novel. All five had weaker academic records. One had even been dismissed from his university on the basis of his grades. Hazelwood offered no evidence to explain why Novel was never considered for any of the positions filled after his application, or why Novel was told that there were no vacancies, when, in fact, there were. The district court's finding that Hazelwood did not act in a discriminatory manner in failing to hire Novel is clearly erroneous.

2. Robert Howell applied in March of 1973 for a position teaching in the same area as had Novel, secondary social studies. Howell graduated from the University of Missouri and was awarded a scholarship on the basis of his grades. At the time of his application, he had a life certificate in Missouri with two years of experience teaching in his field. Moreover, Howell had served as a student teacher at Hazelwood Senior High, and his cooperating teacher had been impressed with his abilities. Hazelwood offered no evidence to explain why Howell was never interviewed for any of the 10 vacancies in social studies filled by whites subsequent to his application. Only one of these whites had more experience than Howell. Neither did Hazelwood attempt to explain why, as a former student teacher at Hazelwood, Howell was not given preference over other ap-

plicants, in light of their practice of doing so. We hold the district court's finding that the failure to hire Howell was non-discriminatory to be clearly erroneous.

3. James Washington also applied for a position as a social studies teacher at the beginning of 1973. Washington graduated from college in 1972 and held a life certificate in Missouri at the time of his application. He had experience as both a student and a substitute teacher. Sometime after he applied, Washington was told by Hazelwood that there were no vacancies in his field, although ten vacancies in this area were filled by whites subsequent to his application. Five of these whites had experience comparable to, or less than, that of Washington. Hazelwood offered no evidence to rebut the inference of discrimination resulting from the Government's evidence. The district court's finding that Washington had suffered no discrimination at the hands of Hazelwood is clearly erroneous.

4. Samuel Downs applied for a position as an industrial arts teacher on May 24, 1972. At that time Downs held a life certificate in Missouri and a bachelor of sciences degree in industrial arts. He had one year of experience teaching industrial art in St. Louis. Downs never had a formal interview but was told by Hazelwood's personnel director that there would probably be no vacancies in his field. Two such vacancies were filled after his application for the 1972-73 school year. One of the teachers hired had the same amount of experience as Downs, and the other had less. The latter, unlike Downs, did not even possess a state life certificate at the time of his application. Hazelwood submitted no evidence to explain why Downs was not considered for either of these positions. We hold the district court's finding that the failure to hire Downs was non-discriminatory to be clearly erroneous.

5. Alice Moore Roach applied for a position as an elementary teacher April 30, 1972. Roach had an excellent academic record with experience as a student teacher.

However, she was never interviewed. The district court erred in finding that Roach was not hired because she lacked teaching certification at the time she applied. Forty-six elementary school teachers with similar experience were hired subsequent to Roach's application. Eight of these 46 teachers also had not applied for certification at the time they applied for teaching positions. Hazelwood offered no evidence to explain why a different standard was applied to these eight white applicants than was applied to Roach. The district court's finding that Hazelwood did not discriminate against Roach on the basis of race is held to be clearly erroneous.

6. Cynthia Edmond applied for a position as a teacher of social studies on July 11, 1972. Subsequently she was told there were no vacancies in her field. The following year she renewed her application. Edmond testified that in college she had a 3.9 grade point average on a 4.0 scale in her major. She possessed a life certificate at the time of her application and had experience student teaching a twelfth grade government class. Edmond was never interviewed by Hazelwood. The district court apparently overlooked evidence that, after Edmond was told no vacancies existed, five whites were hired as social studies teachers for the 1972-73 school year. Three of the five whites had teaching experience no greater than that of Edmond. Nine vacancies in the field of social studies were filled for the 1973-74 year after Edmond had renewed her application. Four of the teachers hired to fill these vacancies had no more teaching experience than Edmond. Hazelwood offered no evidence to explain why in 1972 Edmond was told there were no vacancies when, in fact, there were, or why she was not hired for any of the openings for the 1972-73 or 1973-74 terms. The finding of the district court that Edmond was rejected for non-discriminatory reasons is clearly erroneous.

7. Beverly Ellis applied for an elementary teaching position on August 4, 1972. Ellis had a life certificate and seven years of teaching experience at several different schools. She was interviewed at Brown and Charbonier elementary schools, but was not offered a position at either. Hazelwood offered no evidence to rebut her testimony in support of the Government's view that these interviews were insufficient reason for refusing employment. Moreover, the district court failed to discuss evidence showing that 51 other elementary teaching positions were filled subsequent to her application by persons of lesser experience, 33 of whom had only student teaching experience. Hazelwood offered no evidence to show why she was not hired for any of these 51 positions. We hold that Ellis established a *prima facie* case of discrimination which was not rebutted by Hazelwood.

8. Delores Penton applied for a kindergarten or elementary level position on June 21, 1973. Penton testified that she had a 3.29 grade point average on a 4.0 scale in college and had three years of experience teaching elementary school. Penton was never interviewed. The finding of the district court that she was not hired because she lacked certification was clearly erroneous. The United States offered evidence showing that five persons were hired by Hazelwood as elementary level teachers after Penton's application, all of whom lacked certification at the time of their applications. None of them had as much teaching experience as Penton. Hazelwood offered no evidence to rebut the inference of discrimination created by this evidence. We hold that Penton was denied employment on the basis of race.

9. Timotheus Carson applied for a position teaching secondary English, French, or German on April 6, 1972. Carson possessed a Master of Arts degree in English, French, and German and a life certificate. Moreover, he had 10 years of experience teaching languages. The day after he applied, Carson was interviewed by the department chair-

man, who rated him very highly. However, Hazelwood never offered him a position. The district court failed to note that subsequent to his application, 23 teachers in Carson's field were hired for the 1972-73 school year, all having less teaching experience than he. The great majority of these teachers had significantly less experience than Carson and only one had a master's degree. The finding of the district court that Carson was not rejected on racial grounds is clearly erroneous in light of the Government's evidence.

10. Georgia Shaw applied for a position as an elementary level teacher on April 27, 1973. Shaw had a degree in elementary education and had applied for her Missouri certification at the time of her application with Hazelwood. Moreover, Shaw was a student teacher at Black Jack Elementary School in the Hazelwood District. Her cooperating teacher stated on Shaw's evaluation form dated March 1, 1973:

> She [Shaw] has a good rapport with the children, but she is also able to use effective methods of discipline. She is a willing worker and will do anything that is suggested. She has also shown initiative in making individual projects, games, learning packets, and other aids, to help the individual child. I feel Georgia has the qualities and capabilities which when fully developed will make her a very effective teacher.

Hazelwood never interviewed Shaw. The district court clearly erred in finding that she was not hired because she lacked proper certification at the time of her application. Thirteen whites with no more than student teaching experience were hired by Hazelwood to teach elementary school during the 1973-74 school year. All 13 teachers were interviewed after Shaw's application. Seven of these teachers also lacked certification at the time of their applications. Hazelwood offered no evidence to explain why

Shaw was not hired for one of these positions, in light of her comparable qualifications and the laudatory recommendation of her cooperating teacher. We hold that the Government established a *prima facie* case of discrimination against Shaw, which was not rebutted by Hazelwood.

11. Alexis Smith applied for a position as an elementary school teacher on April 21, 1972. Smith had an undergraduate degree in elementary education and had experience as a student teacher. At the time of her application, Smith had applied for certification in Missouri. Hazelwood never interviewed her. The district court's finding that she was not hired because, at the time of her application, she lacked proper certification was clearly erroneous. Twenty-five white teachers with experience no greater than Smith's were hired as elementary teachers for the 1972-73 school year. Twelve of these teachers also lacked certification at the time of their applications. Hazelwood produced no evidence to explain why Smith was not hired for one of these positions. We hold that the Government established a *prima facie* case of discrimination against Smith which was not rebutted by Hazelwood.

12. Geraldine Thomas applied for a position as fourth, fifth, or sixth grade teacher in April of 1972. Thomas had an undergraduate degree in elementary education and had more than five years of experience teaching fifth grade. Hazelwood never interviewed her. The finding of the district court that Thomas was not hired because she lacked proper certification is clearly erroneous. Evidence adduced by the Government showed that at least six positions for the 1972-73 school year were filled by white teachers, who also lacked certification at the time of their applications. None of these teachers had experience comparable to that of Thomas. Hazelwood produced no evidence to explain why she was not hired to fill one of these

positions. A *prima facie* case of discrimination against Thomas was made out by the United States and was not rebutted by Hazelwood.

13. Mary Etta Wilson applied for a position teaching first, second, or third grade on April 5, 1972. In December of 1972, she wrote Hazelwood asking that her application be kept in the active file. Wilson had an undergraduate level degree in elementary education and more than five years of experience teaching grades one through three. Hazelwood never interviewed her. The district court clearly erred in finding that Hazelwood rejected her for lack of proper certification at the time of her application. The Government's evidence demonstrated that at least eight white teachers, who also lacked certification when they applied, were hired for the school years 1972-73 and 1973-74 to teach at the elementary level. All 8 teachers had less teaching experience than Thomas, and four of them had experience only as student teachers. Hazelwood offered no evidence to explain why Wilson was rejected in favor of less qualified whites. The Government, we hold, made out a *prima facie* case of discrimination against Wilson which was not rebutted by Hazelwood.

14. Robert Wilson applied for a position teaching junior or senior high school science on April 5, 1972. In December of 1972, he wrote Hazelwood asking that his application be kept in the active file. Wilson had an undergraduate degree in science and seven years experience teaching science courses on the senior high level. Hazelwood never interviewed him. The finding of the district court that Wilson was rejected because he lacked certification at the time of his application is clearly erroneous. Evidence adduced by the Government showed that, after Wilson's application, at least five junior or senior high level science teachers, who also lacked certification when they applied, were hired for the 1972-73 or 1973-74 school years. None of the five had as much teaching experience as Wilson; four had experience

only as student teachers. Hazelwood produced no evidence to explain why Wilson was not hired for one of these positions. We conclude that the United States established a *prima facie* case of discrimination against Wilson, and Hazelwood failed to rebut it.

15. Cozeene Triplett applied for a position as an elementary guidance counselor on August 21, 1972. Triplett had a master's degree in counselor education. His application forms indicate that he had certification in elementary administration and seven years of experience teaching fifth grade. Hazelwood never interviewed him. The finding of the district court that Triplett was rejected because he applied "after all teachers for the coming school year had been hired," 392 F.Supp. at 1286, was clearly erroneous. The defendants, the Government evidence showed, hired a white elementary counselor nine days after Triplett applied. This counselor applied after Triplett had, and was interviewed the same day she applied. She did have a master's degree in counselling, but had three fewer years of teaching experience than Triplett. No evidence was offered by Hazelwood to show why Triplett was rejected in favor of a comparably, if not less, qualified white. We hold that the United States made out a *prima facie* case of discrimination against Triplett which was not rebutted by Hazelwood.

16. Willie Palmer applied for a position as a reading specialist, an administrator, or a science teacher on May 3, 1972. Palmer had an excellent academic record and 15 years of experience teaching reading, science, and elementary school. Palmer possessed a life certificate for elementary education. The district court found that he was not certified as a science teacher, and that he lacked a master's degree as required for an administrative position in Missouri. The district court did not discuss evidence adduced by the Government showing that, after Palmer's application, the defendants hired 57 persons to teach elementary school or reading during the 1972-73 school year. None of these persons had as much teaching experience as Palmer. The district court considered significant the fact that Palmer's salary in a non-teaching job at the time of his application was higher than the salary the Hazelwood District could offer him. In light of the fact that Palmer *applied for* the lower-salaried teaching position, evidence concerning the level of his current salary was totally inadequate to rebut the inference of discrimination created by the Government's evidence. Dedicated teachers often choose to teach or remain in teaching positions without regard for the pecuniary compensation involved. The finding of the district court that Palmer was rejected on a non-discriminatory basis is clearly erroneous.

We agree with the district court that the Government's evidence did not substantiate a finding of discrimination against the remainder of the 55 black applicants, including the following individuals, for whom specific findings were made: Judith Ealy, Lonnie Lockett, Patricia Fletcher, Nikki Lenoir, Pearlie Boyd, Atry Cotton, Melvin Lowe, Westelle Florez, Cullen Cook, Naomi Cooksey, Jerome Trotter, Gerald Trotter, Geneice Kincaid, Vina Jones, Charlene Catlin, Jerry Fitch, Harriet Mullins, Naomi Easter, Ruby Lee Carroll, Jesuita Payne, Marva Hill, Elwood Moore, Rosa Lee Thompson, Alberta Riggs, and Sandra Reid.

IV. REMEDY AND BACKPAY

We have held that the Government established a pattern or practice of discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, *as amended*, 42 U.S.C. § 2000e *et seq.* (Supp. II, 1972), by showing that Hazelwood's subjectively-based hiring procedures have resulted in a statistical disparity between the proportion of black teachers employed by Hazelwood, and the proportion of black teachers in the labor market.

Furthermore, we have concluded that the United States proved unlawful discrimination against 16 rejected black applicants.[8] We believe that the United States and these 16 black applicants are entitled to relief.[9]

On remand the district court shall enter an order consistent with the following directions:

1) Hazelwood, its officers, agents, employees, and successors are to be enjoined permanently from engaging in any act or practice in the hiring of teachers which has the purpose or effect of discriminating against any individual because of his race or color.

2) Hazelwood shall promulgate accurate job descriptions and hiring criteria to ensure that all black and white applicants for teaching positions are evaluated on the same basis.

3) Hazelwood shall list clearly on its recruiting and application materials both the requirements for its teaching positions and the procedures by which its selections are made. The materials also shall include both *a*) an announcement that race or color operates as no bar to employment with Hazelwood, and *b*) a description of the proper subjective factors to be considered during the interview portions of the selection procedure, e.g., skill and

[8] Although 14 of the 16 were never interviewed, their race was apparently known to the school district from indications on their application, e.g., Georgia Shaw included a picture with her application, Cozeene Triplett listed all-black Lincoln University as his undergraduate school, and Elwood Moore marked the top of his application with the words "I am Black."

[9] Title VII empowers the court to:

> enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay * * *.

42 U.S.C. § 2000e-5(g).

clarity of expression, self-confidence and attitudes toward teaching.

4) Hazelwood shall ensure that equal notice concerning available openings be given to potential applicants, both black and white. In recruiting procedures, if any, Hazelwood shall include on an equal basis recruiting visits to predominantly black colleges and other institutions. Appropriate steps to ensure student teaching opportunities at Hazelwood for black college students shall also be taken.

5) The district shall make periodic reports to the Justice Department for the three school years subsequent to the entry of the district court's decree on its conduct in hiring qualified black teachers.[10] It shall maintain a record, available for Government inspection, explaining its reasons for selecting a white applicant over available black applicant(s) for each vacancy filled during the three-year period.

6) Hazelwood shall place the names of the 16 applicants discriminated against on a preferred hiring list, giving them the right to refuse first any vacancies to which their qualifications entitle them.

7) On remand, the district court shall award backpay to Timotheus Carson and Beverly Ellis, and it shall determine whether there are any reasons why backpay should not be awarded to the other 14 applicants.[11] The measure of such

[10] In the past, we have found such reporting to be a useful remedy for eliminating discrimination. *United States v. N.L. Industries, Inc.*, 479 F.2d 354, 378, 380-82 (8th Cir. 1973).

[11] The Supreme Court has recently emphasized that it was Congress's purpose in enacting Title VII "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418, 95 S.Ct. 2362, 2372, 45 L.Ed.2d 280, 297 (1975). After discussing the wide discretion of the courts in Title VII cases to "fashion the most complete relief possible," the Court ruled:

(continued)

an award is the difference between the earnings of an applicant had he been employed by Hazelwood and his actual earnings after the time his employment with Hazelwood should have begun, or amounts earnable with reasonable diligence since that time. *E.E.O.C. v. Detroit Edison Co., supra*, at 315.

It is so ordered.

Reversed and remanded.

GIBSON, Chief Judge (dissenting).

I respectfully dissent. The District Court in the instant case concluded that though "[t]he number of black teachers employed by the Hazelwood district is undeniably meager," there is no "basis in the record * * * for concluding that defendants acted in a discriminatory fashion in failing to hire these fifty-five black applicants during 1972 and 1973." 392 F.Supp. at 1287, 1289. During recent years Hazelwood has had to turn away teacher applicants at

" (continued)

> It follows that, given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.
>
> * * * * * *
>
> It is necessary, therefore, that if a district court does decline to award backpay, it carefully articulate its reasons.

Id. at 421 and n. 14, 95 S.Ct. at 2373, 45 L.Ed.2d at 298.

Both Carson and Ellis had completed the entire application process by being interviewed for positions for the '72-'73 school year. The remaining fourteen were never interviewed and thus the record is unclear as to when they would have commenced employment had they not been discriminated against. We hesitate to decide the eligibility of these fourteen for backpay without such information, and accordingly remand the question to the district court.

the rate of two to three thousand per year. For example, only 282 out of 2,373 applicants for the 1972-73 school year were hired. However, the majority, on a cold appellate record, reverses the District Court's finding and concludes instead that:

> [S]tatistical evidence demonstrating a disparity between the proportion of blacks in Hazelwood's workforce and the proportion of blacks in the relevant labor market, when considered in light of Hazelwood's hiring procedures involving the use of vague and subjective criteria, indicate a *prima facie* case of a pattern or practice of employment discrimination in violation of Title VII.

Majority opinion, at 813 [14b].

Though the evidence of discrimination with respect to a handful of the 55 applicants presents a close case, in my view the District Court's finding is not clearly erroneous and should not be disturbed. As to the remainder of the applicants, the Government simply did not come close to proving that the district unlawfully discriminated on account of race.

Under the majority's rationale, every qualified black applicant must be hired in favor of similarly qualified whites, regardless of the tremendous oversupply of qualified applicants seeking employment. This cannot be the law. The matter of determining which of the many teacher applicants are qualified and desirable candidates according to the needs of the district is exclusively for the "broad and sensitive expertise of the School Board and its officials." *Kemp v. Beasley*, 389 F.2d 178, 189 (8th Cir. 1968); *accord*, *Smith v. Board of Education*, 365 F.2d 770, 782 (8th Cir. 1966). To justify federal interference in the hiring process under Title VII, actual discrimination should be proved, not presumed.

The majority here takes an unwarranted step in directing and monitoring the operation of a local school system, in effect undertaking the administrative and operational powers of the school board and officials. This can only lead to a further deterioration in the quality of public education, with a substantial increase in costs on the already overburdened taxpayer. In reality, the two applicants to whom the majority grants backpay are receiving an unearned windfall from school district funds. Of the thousands of applicants rejected by the district, the great majority of whom were likely qualified, these two (and perhaps the remaining 14 to be considered on remand) were fortuitous enough to be black and to complain about not being hired in favor of whites who were similarly or perhaps somewhat less qualified.

I feel particularly uncomfortable with the majority's undue reliance upon inconclusive statistical evidence and with the court's imposition of such a broad remedy. Though, as the majority notes, courts in Title VII litigation do "listen" to statistical evidence, such listening must be done "with a critical ear," *Logan v. General Fireproofing Co.*, 521 F.2d 881, 883 (4th Cir. 1971), closely scrutinizing the many complex variables of statistical empirical proof. *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 231 n. 44 (5th Cir. 1974). I believe the majority has misinterpreted the significance of the District Court's reference to the ratio of black teachers to black students in the Hazelwood district, and has improperly adopted the St. Louis metropolitan area as the relevant labor market to inflate and distort the concentration of available black teachers for comparison.

Here, as always, determination of the relevant labor market from which the employer draws its employees was a question for the trier of fact, *see United States v. Ironworkers Local 86*, 443 F.2d 544, 550-51 (9th Cir.), *cert. denied*, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971), not for this court to make on limited appellate review. The

District Court made no explicit selection of a relevant labor market for comparison with Hazelwood's workforce, but did specifically *reject* the Government's attempt to employ the St. Louis metropolitan area for that purpose. 392 F.Supp. at 1287. Given the fact that Hazelwood in fact recruits its teachers from a broad multistate area, majority opinion, at 808-809, I would hold that the relevant labor market can only be accurately defined as the same large multistate area. *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1371 (5th Cir. 1974). Where justified by the record, federal courts have referred to statistics encompassing statewide or even regional areas. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 430 n. 6, 91 S.Ct. 849, 853, 28 L.Ed.2d 158, 163 (1971) (all of North Carolina); *United States v. Georgia Power Co.*, 474 F.2d 906, 918 (5th Cir. 1973) (the entire South). I would affirm the District Court's finding that no discrimination was proved.

The broad scope of the remedy adopted by the majority is even more distressing in my view. The relief imposed is a prime example of the heavy-handed manner in which the federal courts have interfered in the operation of local schools, to the detriment of the schools and taxpayers, resulting in a misdirection of tax funds voted by the people for educational purposes. The permanent injunction is unwarranted in this case, for it compels the federal courts to monitor operation of the Hazelwood district on an endless basis, thus subjecting the district to the imposition of serious sanctions and penalties possible under a contempt finding.

I take particular exception to the imposition of job selection criteria and hiring preferences and to the requirement that the district must provide, for federal inspection, a record "explaining its reasons for selecting a white applicant over available black applicant(s) for each vacancy filled during the three-year period." Majority opinion, at

819 [27b]. This is a long step in the direction of reverse discrimination operating only in favor of a specified minority. *See Defunis v. Odegaard*, 416 U.S. 312, 336, 94 S.Ct. 1704, 1716, 40 L.Ed.2d 164, 180 (1974) (Douglas, J., dissenting) ("There is no constitutional right for any race to be preferred."). The instant record fails to reveal any exceptional circumstances to justify such a remedy. *Cf. Carter v. Gallagher*, 452 F.2d 315, 331 (8th Cir.), *cert. denied*, 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 338 (1972). Preferential remedies of this sort should be resorted to only when no alternative means exist for eradicating discrimination.

In essence, the majority seeks to hire black teachers without regard to the relevant employment criteria — professional qualification, teaching talent, skills and experience — and in spite of the racial and ethnic makeup of the student, teacher and taxpayer composition of the school district and the larger relevant labor market. Under the majority rationale every qualified black must be hired irrespective of the relevant labor market and the qualifications of competing white teachers. Surely, neither the Constitution nor the statute, Title VII, mandates such an extensive interference in local school operations.

APPENDIX C
JUDGMENT

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

FILED
APR 20 1976
ROBERT C. TUCKER
CLERK

No. 75-1422

September Term, 1975

United States of America,

Appellant,

vs.

Hazelwood School District, C.O. McDonald, Superintendent, Robert Bischof, Robert Coleman, Dorothy Smith, Charles Sweeney, Donald Mattox and Milton Straus, Members of the Board of Education of the Hazelwood School District,

Appellees.

APPEAL FROM the United States District Court for the Eastern District of Missouri

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Missouri and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed.

And it is further ordered by this Court that this cause, be, and remanded to the said District Court for proceedings consistent with the majority opinion of this Court this day filed herein.

April 20, 1976

Order entered in accordance with the opinion:
/s/Robert C. Tucker
Clerk, U.S. Court of Appeals, 8th Circuit.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

FILED
MAY 25, 1976
ROBERT C. TUCKER
CLERK

75-1422 **September Term, 1975**

United States of America,
Appellant,

vs.

Hazelwood School District, et al.,
Appellees.

Appeal from the United States
District Court for the
Eastern District of Missouri

The Court having considered petition for rehearing en banc filed by counsel for appellees and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

May 25, 1976